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**SUPPLEMENT TO**  
**NEW PROBATE LAW AND PRACTICE**

**WITH**  
**ANNOTATIONS AND FORMS**

**FOR USE IN**  
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**MONTANA, NEVADA, NEW MEXICO, NORTH DAKOTA,**  
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**WASHINGTON, AND WYOMING**

**BY**  
**W. S. CHURCH**  
**OF THE SAN FRANCISCO BAR**  
**AUTHOR OF CHURCH ON HABEAS CORPUS, ANNOTATED SAN FRANCISCO**  
**CHARTER, ETC.**

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**VOLUME THREE**

**BY**  
**CURTIS HILLYER**

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**BENDER-MOSS COMPANY**  
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## **PREFACE TO VOLUME THREE**

This volume, supplementary to Volumes One and Two of the original edition of Church's Probate, brings the subject down to October, 1914. It follows the same lines as Volumes One and Two.

I desire to acknowledge my indebtedness to Mr. Henry Thompson, of the San Francisco Bar, for valuable assistance in the preparation of the manuscript.

· · · CURTIS HILLYER.

SAN FRANCISCO, December 1st, 1914.







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# TABLE OF NEW STATUTES AND AMENDMENTS TO CODES

The following is a table of the statutes and amendments to Codes relating to the matters in question which have been enacted in the various states covered by this work since the year 1908, with the exception of the State of California, as to which they are printed *in extenso* in their appropriate places throughout this volume.

1909.

## ALASKA.

### COMPILED LAWS OF THE TERRITORY OF ALASKA, 1913.

Section 367, page 253—Insane persons. Marshal charged with transportation and custody of—to deliver them to asylums. March 3, 1909. 35 Stat. L. 840-841. Chapter 786, section 3.

Chapter 39, page 371—Care and custody of the insane. Sections 830-832a. February 6, 1909. 35 Stat. L., 601.

1913.

## ALASKA.

### SESSION LAWS.

Disposition of estates of persons who have disappeared—Chapter 60, page 155.

Wills executed without the territory—Chapter 61, page 155.

Amending chapter 19 of the compiled laws of Alaska relating to escheats—Chapter 73, pages 278-83.

The sections amended are 608 to 615 inclusive.

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1912.

## LAWS OF ARIZONA.

## FIRST LEGISLATURE OF THE STATE OF ARIZONA.

Inheritance tax—Chapter 15, page 35. (Special session.)

1913.

## LAWS OF ARIZONA.

## REVISED STATUTES OF ARIZONA.

## PART IV.

## Probate Procedure, Etc.

(Chapter 49, Laws 1913. Second special session.)

Page 394.

New and amended sections\*: Probate Procedure, 741 (1303), 743 (1305), 746 (1308), 754 (1318), 794 (1372), 795 (1373), 803 (as mod.), 812 (as mod.), 841 (1430), 842 (as mod.), 866 (1465), 869 (1468), 870 (1469), 882 (1493), 903 (1514), 913 (1527), 919 (1536), 934 (1552), 958 (1577), 963 (1578), 964 (1578), 965 (1578), 977 (1597), 978 (1598), 980 (1600), 981 (1601), 983 (1603), 984 (1604), 986 (1606), 1007 (1632), 1008 (1633), 1014 (1639), 1034 (as mod.), 1042 (1670), 1055 (1699), 1056 (1700), 1057 (1701), 1058 (1702), 1059 (1703), 1060 (1703½), 1090 (1723), 1094 (homestead new section), 1100 (mod. of 1402), 1106 (1747). Guardian and Ward, 1110 (1751), 1136 (1767), 1141 (1772), 1160 (1791), 1167 (1798), 1169 (1799), 1180 (1810 as mod.), 1188 (adoption Oregon Laws, Bellinger & Cotton's Ann. Codes and Stat. 1901), 1189 (Oregon), 1190 (Oregon mod.), 1191 (Oregon mod.), 1192 (as mod.), 1193 (as mod.), 1197 (Oregon). Appeals, 1227 (963 as mod.), 5030 (see Inheritance Tax Law 1912). Homestead, 3636 (mod. of 2883). Guardian and Ward, 646 (new section), 1250 (new section). Executors and Administrators, 4907 (chapter 63, Laws 1913, third special session), 1251 (new section), 556 (R. L. Minn. 1905, section 4270). Escheat, 1511 (new section), 1512 (new section).

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\*The figures within brackets are the numbers of the sections of the Code of Civil Procedure of the state of California which correspond to the section given by the Revised Statutes of Arizona. The words "as modified" in brackets mean that the section is a modification of the section of the Revised Statutes of the same number or of another number given.



1909.

COLORADO.

SESSION LAWS.

An act relating to wills—Chapter 219, approved April 23, 1909.

An act amending the Inheritance Tax Law—Chapter 193, approved April 17, 1909.

1910.

COLORADO.

NOTHING APPLICABLE.

1911.

COLORADO.

SESSION LAWS—EIGHTEENTH SESSION.

An act amending the laws relating to the filing of homesteads—Chapter 148, approved February 20, 1911.

An act amending the law as to hearing on final settlement of estates (see 7241 Revised Statutes 1908)—Chapter 131, approved May 29, 1911.

An act relating to the binding of orphan children—Chapter 80, approved June 2, 1911.

An act concerning the bonds of executors, administrators, guardians and conservators—Chapter 88, approved June 2, 1911.

An act relating to the adoption of children and heirs at law—Chapter 1, approved May 28, 1911.

An act relating to the sale or mortgage by administrators of real estate—Chapter 200, approved May 29, 1911.

1913.

COLORADO.

SESSION LAWS—NINETEENTH SESSION.

An act relating to wills—Chapter 164, April 30, 1913.

An act imposing an inheritance tax—Chapter 136, May 14, 1913.



**An act relating to the settlement of estates of deceased persons—Chapter 81, April 13, 1913.**

**An act for the protection of children—Chapter 50, April 12, 1913.**

**An act to amend an act entitled "An Act in Relation to Probate Matters"—Chapter 1, May 1, 1913.**

**1909.**

**IDAHO.**

**SESSION LAWS.**

**An act providing for the protection of orphan, etc., children—Page 38.**

**1911.**

**IDAHO.**

**SESSION LAWS.**

**An act relating to the delivery of property and the discharge of executors and administrators—Page 619.**

**1913.**

**IDAHO.**

**SESSION LAWS.**

**An act authorizing the refunding of inheritance tax in certain cases—Page 334.**

**1909.**

**KANSAS.**

**An act concerning the Code of Civil Procedure, section 709, relating to writs of habeas corpus in favor of guardians and for protection of infants and insane persons—Chapter 182, page 460.**

**Section 419, action by personal representatives for damages for wrongful death—Chapter 182, page 403.**



An act concerning the filing of claims against estates in the probate court—Chapter 109, page 209.

An act to provide for the assessment and taxation of legacies and successions—Chapter 248, page 595.

1911.

## KANSAS.

An act to amend various sections of the General Statutes of Kansas, 1909, relating to the settlement of the estates of deceased persons, and repealing said original sections—Chapter 188, page 319.

An act relating to wills executed outside the state—Chapter 336, page 597.

An act amending certain sections of chapter 49 of the General Statutes of Kansas, 1909, concerning guardians and wards—Chapter 200, page 351.

An act relating to the defense of guardian of infants and persons of unsound mind—Chapter 228, page 405.

1913.

## KANSAS.

An act to repeal chapter 248 of the Session Laws of 1909 providing for the assessment and taxation of legacies and successions—Chapter 330, page 562.

An act fixing the amount of bond to be required of executors, etc., when such bonds are given by a surety company—Chapter 195, page 312.

An act relating to the settlement of estates of deceased persons—Chapter 196, page 313.

1909.

## MONTANA.

An act to authorize public administrators to summarily settle estates under \$200—Chapter 134, page 199.

An act relating to witnesses with regard to transactions between witness and a deceased person—Chapter 66, page 81.



**1911.****MONTANA.**

**An act relating to the appointment of guardians of inebriates and other incompetents with property—Chapter 139, page 401.**

**1913.****MONTANA.**

**An act to amend section 7641 of the Revised Codes of Montana of 1907 relating to accounts of executors and administrators—Chapter 122, page 470.**

**An act relating to the distribution of the estates of deceased persons—Chapter 54, page 104.**

**An act relating to proceedings for the recovery of escheated property—Chapter 132, page 483.**

**1909.****NEVADA.****NOTHING APPLICABLE.****1911-1912.****NEVADA.****SPECIAL SESSIONS.**

**An act to amend an act entitled "An Act to provide for the appointment of guardians and to prescribe their duties," approved March 11, 1899—Chapter 69, page 71.**

**An act to amend section 105 of an act entitled "An Act to regulate the settlement of the estates of deceased persons," approved March 23, 1897—Chapter 33, page 28.**

**An act to facilitate the execution of deeds and conveyances of property of persons who are bound by bond or contract to convey real estate or transfer personal property, but who die before making the conveyance or transfer, authorizing the district court having jurisdiction over the estate to decree that the executor or adminis-**



trator complete the execution of the contract—Chapter 152, page 315.

An act supplementary to an act entitled "An Act to regulate the settlement of the estates of deceased persons," approved March 23, 1897—Chapter 155, page 316.

1913.

### NEVADA.

An act to amend an act entitled "An Act to provide for the appointment of guardians and to prescribe their duties," approved March 11, 1899—Chapter 34, page 27.

An Inheritance Tax Law—Chapter 266, page 411.

An act to amend an act entitled "An act to regulate the settlement of the estates of deceased persons," approved March 23, 1897—Chapter 36, page 28.

An act to amend an act entitled "An Act to amend section 1 of an act to amend an act entitled 'An Act to regulate the settlement of estates of deceased persons,' approved March 23, 1897, and as amended and approved March 16, 1899, approved March 6, 1901"; the act amended hereby having been approved March 23, 1903, and being section 6116 of the Revised Laws of Nevada (1912)—Chapter 20, page 56.

1909.

### NEW MEXICO (TERRITORY).

An act in regard to garnishment proceedings, section 28, as to garnisheeing legacies in hands of executors—Chapter 63, page 176.

1912.

### NEW MEXICO (STATE).

An act relative to publications, section 5, affecting publication of probate notices—Chapter 49, page 77.



1913.

## NEW MEXICO.

NOTHING APPLICABLE.

1911.

## NORTH DAKOTA.

An act to amend section 5187 of the Revised Codes of 1905, relating to order of succession—Chapter 223, page 339.

An act to provide for the ascertaining and giving notice of the title of the lands to the heirs of the deceased persons and establishing the right of heirship to real property and to provide a method of procedure therefor and to repeal sections 8040, 8041, 8042, 8043, 8044, and 8045 of the Revised Codes of North Dakota—Chapter 220, page 335.

An act to confirm title to real estate sold by decedents in their lifetime under contract, conveyed pursuant to article 8 of chapter 6 of the Probate Code of North Dakota as estates now closed, and not approved by the county judge—Chapter 214, page 331.

An act relating to endorsement of allowance or rejection of claims by executors or administrators and providing for notice thereof—Chapter 215, page 331.

An act relating to rejecting claims and providing how suit is instituted—Chapter 216, page 332.

An act relating to time to apply for letters of administration and providing when the statute of limitations shall run against claims against decedents—Chapter 217, page 333.

An act relating to the disposition of unclaimed shares of estate in county court—Chapter 224, page 341.

An act prohibiting public administrators from acting as attorneys in the estates of decedents—Chapter 234, page 350.

An act relating to the adoption of minor children and children who have been abandoned—Chapter 3, page 3.

1909.

## NORTH DAKOTA.

An act to amend chapter 119 of the Sessions Laws of 1907 in regard to evidence as to statements and transactions with decedents—Chapter 109, page 117.



An act to amend section 8184 of the Revised Codes of North Dakota for 1905, relating to the commissions to be allowed administrators and executors where no provision is made in the will—Chapter 118, page 125.

1913.

### NORTH DAKOTA.

An act providing for taxation and fixing the rate in taxation of inheritances, devises, bequests, etc., etc.—Chapter 185, page 267.

An act relating to the approval of mortgages executed by an administrator, executor, or guardian—Chapter 130, page 170.

1909.

### OKLAHOMA.

Compiled Laws of Oklahoma, 1909, Snyder, covering all the laws of the state of Oklahoma up to and including those of the second legislature of 1909 relating to the topics embraced in this work.

1911.

### OKLAHOMA.

#### SESSION LAWS.

An act relating to the conferring upon the commissioner of charities and corrections power to act as guardian in certain cases—Chapter 25, page 45.

An act relating to the adoption of an illegitimate child by its father—Chapter 73, page 169.

Note—As to adoption of code, see further, Revised Laws of Oklahoma, 1910, approved March 15, 1911—Statutes, page 192.

1913.

### OKLAHOMA.

An act authorizing administrators, executors, or guardians to mortgage real estate, amending article 11 of chapter 86, Snyder's



1909 Compiled Statutes of the state of Oklahoma—Chapter 66, page 103.

An act limiting guardianships—Chapter 172, page 391.

An act relating to the appointment of guardians for minors—Chapter 29, page 59.

An act legalizing the transfer of certain probate matters and proceedings for protection of minors' estates—Chapter 208, page 460.

## 1909.

### OREGON.

An act to amend sections 2 and 16 of the Inheritance Tax Law of 1903—Chapter 15, page 60.

An act to amend section 1220 of Bellinger & Cotton's Annotated Codes and Statutes, relating to distribution and payment of legacies—Chapter 26, page 68.

An act to amend section 797 of Bellinger & Cotton's Annotated Codes and Statutes, providing that an agreement by an executor or administrator to pay the debts of his testator or intestate out of his own estate must be in writing—Chapter 27, page 69.

An act to amend an act approved February 3, 1905, empowering executors and administrators to execute deeds and fully carry out contracts for sale of property made by deceased to same extent as he could have done if living—Chapter 125, page 187.

An act to amend section 2 of chapter 148 of the General Laws of Oregon for 1907, relating to the escheating of moneys of decedents on deposit in banks—Chapter 36, page 75.

## 1911.

### OREGON.

An act providing for the escheating of certain moneys belonging to the patients who were inmates of the Oregon State Insane Asylum and have died or escaped from said institution—Chapter 69, page 108.

An act to amend section 7083 of Lord's Oregon Laws, the same being section 5316 of Bellinger & Cotton's Annotated Codes and Statutes, relating to the adoption of children—Chapter 11, page 29.



1909.

## SOUTH DAKOTA.

An act amending sections 38 and 39 of the Revised Probate Code, 1903, of the state of South Dakota—Chapter 2, page 2.

An act to amend section 3224 of chapter 29 of the Political Code of South Dakota, entitled "Homestead and Conveyance Thereof"—Chapter 136, page 211.

An act to amend section 271 of article 1, chapter 10 of the Revised Probate Code of 1903, relating to the liabilities and compensation of executors and administrators—Chapter 24, page 26.

An act entitled "An Act providing the mode of procedure in relation to escheats and for the reduction of escheated property into the possession of the state"—Chapter 104, page 177.

1911.

## SOUTH DAKOTA.

An act entitled "An Act relating to the publication of notice in the probate court"—Chapter 204, page 292.

1913.

## SOUTH DAKOTA.

An act entitled "An Act providing for taxation of and fixing the rate of taxation on inheritances, devises, bequests, etc., etc."—Chapter 243, page 337.

An act entitled "An Act to provide for the determination of heirships, the share of such heirs respectively in and to certain real estate by action in the circuit court"—Chapter 231, page 313.

An act to amend sections 153, 155, and 156 of the Probate Code relating to homesteads and procedure in county court—Chapter 236, page 321.

An act entitled "An Act to amend sections 174, 175, and 176 of the Revised Probate Code of 1903, relating to claims presented to executors and administrators"—Chapter 207, page 288.

An act entitled "An Act to confer on county courts authority to declare the termination of life estates and interests, liens, and incumbrances upon real property in certain cases"—Chapter 176, page 217.

An act relating to the admission of testimony as to transactions had with a testator or intestate—Chapter 371, page 610.



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**1909.**

**UTAH.**

**NOTHING APPLICABLE.**

**1911.**

**UTAH.**

**An act relating to bastards and providing for security for the support of illegitimate children—Chapter 62, page 84.**

**1913.**

**UTAH.**

**An act relating to leasing and options to purchase mining property belonging to the estates of deceased persons or wards under guardianship—Chapter 67, page 107.**

**1909.**

**WASHINGTON.**

**An act amending section 4828 of Ballinger's Annotated Codes and Statutes of Washington in relation to recovery of damages for the death of a person caused by the wrongful act or neglect of another—Chapter 129, page 425.**

**An act relating to the liability of homesteads to execution or forced sale in certain cases—Chapter 44, page 71.**

**An act relating to the appointment of guardians—Chapter 118, page 408.**

**1911.**

**WASHINGTON.**

**An act relating to wills executed without the state of Washington—Chapter 8, page 9.**

**An act to amend the inheritance tax law of 1907—Chapter 19, page 60.**



1913.

WASHINGTON.

An act providing for the charging by executors, administrators, and guardians of premiums on surety company bonds—Chapter 49, page 138.

1909.

WYOMING.

SESSION LAWS.

An act to amend and re-enact section 3449 of the Revised Statutes of 1899, relating to actions by representatives of deceased persons, the amount to be recovered in such action, the distribution thereof, and the time within which such actions shall be commenced—Chapter 3, page 5.

An act to amend and re-enact sections 3901, 3902, and 3908 of the Revised Statutes of 1899, relating to homesteads—Chapter 102, page 149.

1911.

WYOMING.

SESSION LAWS.

An act to amend and re-enact section 5695 of the Wyoming Compiled Statutes of 1910, relating to the partial distribution of estates—Chapter 37, page 48.

An act entitled "An Act fixing the compensation of executors, administrators, and their attorneys, and repealing sections 5580 and 5581, Wyoming Compiled Statutes 1910"—Chapter 16, page 17.

An act to amend and re-enact section 3138 of the Wyoming Compiled Statutes of 1910 relating to escheats and forfeitures—Chapter 57, page 76.



**1913.**

**WYOMING.**

**SESSION LAWS.**

**An act relating to the probate of estates of nonresidents—  
Chapter 31, page 25.**

**An act to amend and re-enact section 4238 of Wyoming Compiled  
Statutes of 1910 relating to the powers of abstract and loan com-  
panies and the manner of their appointment and qualification as  
receivers, trustees, administrators, executors, and guardians—  
Chapter 47, page 39.**



# **PART I.**

## **ADOPTION, SUCCESSION AND ESCHEAT.**

### **CHAPTER I.**

#### **ADOPTION.**

##### **§ 4. Adoption of Children. Consent Necessary, When.**

###### **LAW OF ADOPTION.**

1. Nature of proceedings.
2. Essentials of adoption.
3. Who may adopt.
4. Consent to adoption.
5. Examination of parties. Welfare of child.
6. Order of adoption.
7. Abandoned child.
8. Indian children.
9. Illegitimate children.
10. Evidence of adoption.
11. Effect of adoption. Divorce proceedings, etc.
12. Attacking the order.
13. What will not invalidate proceedings.
14. Adoption in another state.
15. Inheritance.
16. Specific performance.
17. Hawaii.

**§ 4. Adoption of children. Consent necessary, when.** A legitimate child can not be adopted without the consent of its parents, if living; nor an illegitimate child without the consent of its mother, if living; except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery or cruelty, and for either cause divorced, or adjudged to be habitually intemperate in the use of intoxicants, or who has been judicially deprived of the custody of the child on account of cruelty or neglect.



**[Abandoned child.]** Neither is consent of any parent necessary in case of any abandoned child. Any child deserted by its parents without provision for their identification, or relinquished by its parent or parents for the purpose of adoption expressed in writing signed and acknowledged by such parent or parents before an officer authorized to take acknowledgments, or before the secretary of any organization or society engaged in the work of placing dependent or deserted children into homes in this state, which organization or society has obtained a permit therefor, duly executed in writing, from the state board of charities and corrections, shall from the date of such act of desertion or of such relinquishment be deemed to be an abandoned child within the meaning of this section. Any child left in the care or custody of another by its parent or parents, without any provision for its support, for the period of one year, may after such notice to the parent or parents residing within the state and to such other relatives of said child residing within the county as the court shall require, be determined by order of the juvenile court of the county in which said child was so left to be an abandoned child within the terms of this section.

**[Child in orphan asylum.]** Any abandoned child within the meaning of this section, or any child whose parent or parents have been judicially deprived of its custody on account of cruelty or neglect, maintained by or in the custody of any orphan asylum within this state, any charitable organization or society receiving state aid or receiving commitments from the juvenile court, may be adopted with the consent of the managers of such orphan asylum, charitable organization or society. Any orphan child for whose support no provision has been made by any person for a period of one year, but who has been maintained during said year by or in the custody of any orphan asylum within this state, any charitable organization or society receiving state or receiving commitments from the juvenile court, may be adopted with the consent of the managers of such orphan asylum, charitable organization or society.—**Kerr's Cyc. Civ. Code (Kerr's Cum. Supp., p. 865), § 224.**



## LAW OF ADOPTION.

**1. Nature of proceedings.** Adoption is a proceeding unknown to the common law and depends upon the statutes of the different states. The courts of one state can not take judicial notice of the adoption laws of other states, and the statutes being in derogation of the common law must be strictly construed: *Long v. Dufur*, 58 Or. 162, 113 Pac. 59.

The adoption of a child is a proceeding unknown to the common law and exists now only by virtue of the statutes which expressly prescribe the conditions under which an adoption may be legally effective: *Matter of Cozza*, 163 Cal. 514, 126 Pac. 161. (See page 11.)

**2. Essentials of adoption.** (See page 11.)

**3. Who may adopt.** (See page 12.)

**4. Consent to adoption.** Parental consent is absolutely essential to confer jurisdiction to make an order of adoption subject to the conditions provided by the statute. When the child has come under the control of the juvenile court, that fact can be considered only for the purpose of determining desertion or abandonment by the parents. The court has no discretion to make an order of adoption regardless of the consent or wishes of the parent and merely that the interest of the child will be promoted thereby: *In re Cozza*, 163 Cal. 514, 126 Pac. 161.

As the act of adoption is to sever absolutely the legal relation between the parents and child, to destroy their reciprocal relations, and create entirely new ones between the adopted parents and the child, the law, recognizing the natural and sacred rights of natural parents to their children, will permit this to be done only with the consent of the parents, unless under exceptional conditions, which it itself prescribes, such consent is declared unnecessary: *Matter of Cozza*, 163 Cal. 514, 126 Pac. 161.

Where a divorce has been granted for cruelty, and the custody of a child is awarded absolutely to the innocent party, the consent of the guilty one is not required in adop-



tion proceedings under the provisions of section 224 of the Civil Code; however, this section does not interfere with the orders of the court in divorce proceedings concerning the custody of the children, nor does it dispense with the consent of the parent to whom the custody of the child was awarded in the divorce proceeding: *Matter of Cozza*, 163 Cal. 514, 126 Pac. 161.

Under the California statutes, consent is made absolutely essential to confer jurisdiction on the superior court to make an order of adoption, unless the conditions or exceptions exist especially provided by the statute itself and which render such consent of the parents unnecessary. Unless such consent is given, or for the exceptional causes expressly enumerated is dispensed with, the court has no discretion in the matter: *Matter of Cozza*, 163 Cal. 514, 126 Pac. 161.

Where an order permitting the adoption of a minor child, without the consent of its mother, is appealed from, the appellate court can not direct the restoration of the child to its mother, on reversal of the order, but her remedy is to obtain possession of the child under habeas corpus proceedings: *Matter of Cozza*, 163 Cal. 514, 126 Pac. 161. (See page 12.)

#### REFERENCES.

Constitutionality of statute permitting adoption of child without consent of parents, see note 18 L. R. A. (N. S.) 926, 927.

Validity of adoption without consent of natural parents, see note 30 L. R. A. (N. S.) 146.

**5. Examination of parties. Welfare of child.** In a petition for the adoption of a minor the all important factor in the determination of the question is the welfare of the child. The matter of adoption rests in the sound discretion of the court and in the exercise of that discretion information from all proper sources should be sought by the one who must determine the matters so momentous to the infant. A denial of a petition to adopt will not be disturbed on appeal without the showing of a very grave abuse of discretion by the court: *In re Bewley, a minor*, Cal. Dec. Jan. 12, 1914, p. 80, 138 Pac. 689; *In re Fields*, 56 Wash. 259. (See page 13.)



**6. Order of adoption.** (See page 14.)

**7. Abandoned child.** In deciding the right to a child as between a mother who had abandoned it and adoptive parents, the pecuniary standing of the parties is not to be considered; but the welfare of the child is of grave importance and may be made controlling: *In re Fields*, 56 Wash. 259, 105 Pac. 466.

Under California Civil Code, section 224, providing that a child may be adopted without the consent of its parents, where it has been abandoned by them, the "abandonment," as contemplated in this section, is an intention to do so, express or implied from the conduct of the parent respecting the child: *Matter of Cozza*, 163 Cal. 514, 126 Pac. 161. (See page 14.)

**8. Indian children.** (See page 15.)

**9. Illegitimate children.** An illegitimate child is sufficiently received "into the family" to establish its adoption where it is received in the house in which the father has his fixed place of abode, notwithstanding that he is unmarried and lives there alone for long periods of time: *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

Where the right of succession to the estate of a deceased person depends upon the legitimation of illegitimate children of the deceased under section 230 of the Civil Code, and an adversary verdict was found upon questions submitted, that deceased was the father of each child, that he publicly acknowledged each during its minority as his own child, that he received each into his family as his own child and that he otherwise treated each child during its minority as if it were his legitimate child, and the trial court adopted these findings as its own, such findings are sufficient to establish the right of succession; and the main question first to be considered is the assigned insufficiency of the evidence to support them: *Estate of Gird*, 157 Cal. 534, 108 Pac. 499.

An illegitimate unmarried minor child can not be adopted under the laws of Oklahoma without the consent of the



mother: *Allison v. Brian*, 26 Okla. 520, 109 Pac. 935. (See page 16.)

**10. Evidence of adoption.** The acknowledgment of a foster father who had previously adopted the infant, is necessary to the validity of an instrument of adoption under Code Iowa 1873, sections 2307, 2311, which required the acknowledgment of the parents in the manner of the acknowledgment of deeds: *Long v. Dufur*, 58 Or. 162, 113 Pac. 59. (See page 17.)

**11. Effect of adoption. Divorce proceedings, etc.** The effect of an adoption under the California Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation and necessarily implies that the natural relationship between the child and its parents is superseded, and as the adopted child has the right to succeed to the estate of the adopting parent, so the adopting parent is entitled to inherit as a parent to the exclusion of the parent by blood, and the blood relationship is not revived by the death of the adopting parent prior to the death of the child: *Estate of Jobson*, 164 Cal. 315, 128 Pac. 938.

In Kansas a child legally adopted takes the name of the adopting parent and is given the same personal rights and rights of inheritance as a natural child. The rights of an adopted child have not been in any way repealed or limited by the amendment in 1891 of the act relating to descents and distributions. The words "living issue" in that amendment were used in the sense of "living children," so that an adopted child of a prior deceased daughter of an intestate inherits through her adopted mother: *Riley v. Day*, 88 Kan. 503, 129 Pac. 524.

The natural parent of an adopted child has no parental rights over such child after its adoption and therefore can not take proceedings under Political Code, sections 3205, 3214, for the protection of the child from an improper guardian: *State v. Kelley* (S. Dak.), 143 N. W. 953.



Where the probate court has granted a petition for the adoption of a child such order is final and appealable and the father of the child may maintain an appeal from the order even though in divorce proceedings the custody of the child had been awarded to the mother: *Heydorf v. Cooper*, 90 Kan. 511, 135 Pac. 518.

Under the adoption acts of the state of Kansas, a child legally adopted takes the name of the adopting parents and is given the same personal rights and is entitled to the same rights of inheritance as a natural child: *Riley v. Day*, 88 Kan. 503, 129 Pac. 524.

The amendment of 1891 of the act concerning descents and distributions (Gen. Stats. 1909, Sec. 2952, Kan.) did not repeal or limit the rights conferred on an adopted child by the adoption act and to which he was entitled prior to said amendment: *Riley v. Day*, 88 Kan. 503, 129 Pac. 524.

After the legal adoption of a minor child by another person the parental obligations of its natural parents cease to exist, and they are no more legally liable for the maintenance, support and education of such child than would be a perfect stranger. It follows that an adopting parent may contract with the natural parents or with its mother and her second husband, to take care of, support and educate the child for compensation as freely and legally as such a contract could be made by the adopting parent with a stranger to the blood of such child: *Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426.

In an action by the second husband of the mother of a child which had been legally adopted by the deceased, after the mother's divorce from its father, and which had been committed to the care of the mother and such second husband under an agreement for compensation, which action was brought for such compensation upon a rejected claim against the adopting parent's estate, and in which the evidence for the plaintiff was sufficient to make a prima facie case for recovery, it was error to grant a nonsuit therein at the close of the plaintiff's evidence: *Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426.



It is held that, applying the principles of evidence to the motion for a nonsuit, the evidence for the plaintiff must be taken as showing that the agreement for compensation was with the plaintiff's husband as well as with his wife, the child's mother; that the care of the adopted child can not be presumed gratuitous; that an explanation of a payment of \$1100 made to the mother after receiving the adopted child, not connected with compensation therefor, but in consideration of her relinquishment of a claim against a different estate, in which her mother and the adopting parent were interested, must be assumed as true; and that every favorable inference and presumption from the evidence must be taken as true; and that the nonsuit can not be sustained: *Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426.

The court properly allowed evidence on the cross-examination of the plaintiff to show that the \$1100 had been received from the adopting parent by the mother after she received the care of the child for the purpose of an inference that it was received in payment therefor, though the answer may show a purpose foreign thereto: *Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426. (See page 17.)

**12. Attacking the order.** Where the court is satisfied of the fitness and propriety thereof a ruling authorizing an adoption will not be reviewed except for abuse of discretion, and where consolidated applications are heard for the adoption of an orphan by relatives of the mother, and for guardianship by relatives of the father, it is not an abuse of discretion to deny the adoption and grant the guardianship where both parties are suitable to have the care of the child: *In re Wells*, 60 Wash. 518, 111 Pac. 778.

Secret removal of the child to another county by the mother and the institution in that other county of adoption proceedings without notifying the father, or the court, that divorce proceedings were pending in another court between the parents is a fraud upon the court granting the adoption which was properly set aside on application of the father: *Miller v. Higgins*, 14 Cal. App. 156.



Where upon the granting of a divorce the custody of a child has been awarded to the mother, the father may maintain an appeal from an order of the probate court granting a petition for the adoption of the child: *Heydorf v. Cooper*, 90 Kan. 511, 135 Pac. 578. (See page 18.)

**13. What will not invalidate proceedings.** When under a decree of divorce the custody of the children is given to the mother the divorced father is not entitled to notice of proceedings for the adoption of one of the children: *In re Beers*, — Wash. —, 139 Pac. 631.

The construction of section 1696, Rem. & Bal. Code of the state of Washington, holding that a divorced father, custody of children being given to the mother, is not entitled to notice of adoption proceedings, is not unconstitutional for the right of a parent to the custody of a child is not an absolute right, but is subject to the right of the state to interfere in the interests of the child, and the father had had his day in court concerning the custody during the divorce proceedings: *In re Beers*, — Wash. —, 139 Pac. 631.

Evidence relating to the want of fitness of an adopting parent upon the hearing of a petition to set aside the order of adoption on the ground that the father had had no notice of the proceedings, the petition being granted on that ground, is inadmissible as the question of fitness may always be considered in another proceeding to determine what was for the best interests of the child: *In re Beers*, — Wash. —, 139 Pac. 633. (See page 18.)

**14. Adoption in another state.** (See page 19.)

**15. Inheritance.** If an agreement of adoption by which the adopting parent "covenants and undertakes to give" the adopted child the same rights in her estate after her decease as though the child were her natural child, is not sufficient of itself to confer the right of inheritance, the statute (Act 83, L. 1905) gives the agreement full force and effect in that regard by clothing the adopted child with the right of inheritance: *Leialoha v. Walters*, 21 Haw. 304.



The words "living issue" as used in the amendment of 1891 of the act concerning descents and distributions were employed by the Kansas legislature in the sense of living children and hence an adopted child of a prior deceased daughter of an intestate does inherit a portion of the estate of such intestate through her adopting mother: *Riley v. Day*, 88 Kan. 503, 129 Pac. 524.

Where the law under which a child is adopted limits its right of inheritance to the estate of the adoptive parents, such child can not, after the death of its adoptive father, inherit from the deceased brother of such adoptive father, or his other collateral kindred: *Boaz v. Swinney*, 79 Kan. 332, 99 Pac. 621.

An adopted child has no right of inheritance from its adopted parents other than those given by the law under which it was adopted: *Boaz v. Swinney*, 79 Kan. 332, 99 Pac. 621.

If the act of adoption confers upon the child the right to succeed to the estate of the adopting parent in like manner as a child of the blood, it must follow that, upon the death of the child, the adopting parent is entitled to inherit as a parent. To hold that, although the relation of parent and child existed between such parent in blood, and that such relation was supplanted by the new relation created by the adoption, but that nevertheless upon the death of the foster parent such former relation was revived, would be to make, rather than to construe, a statute. Once the conclusion is reached that the effect of adoption in the code is to substitute the adopting parent for the parent by blood, this conclusion must be given its logical results: *In re Jobson's Estate*, 164 Cal. 312, 128 Pac. 938-940.

As the right of inheritance is purely a matter of statutory regulation, so is the subject of the adoption of children and the rights and obligations springing therefrom: *In re Jobson's Estate*, 164 Cal. 312, 128 Pac. 938. (See page 20.)



## REFERENCES.

Right of adopted child to inherit property from a relative of the adoptive parent, see note 33 L. R. A. (N. S.) 139.

Power to give child under existing adoption right to inherit from parent or parent's relatives, see note 35 L. R. A. (N. S.) 216.

Descent and distribution of property of adopted child, see note 43 L. R. A. (N. S.) 1056.

Right of child adopted in other state to take under local statute of descent and distribution, see note 21 L. R. A. (N. S.) 679, 25 L. R. A. (N. S.) 1285.

**16. Specific performance.** (See page 21.)

## REFERENCES.

Enforceability of contract to give child share of estate in consideration of the surrender of the child to promisor, as affected by noncompliance with the statute prescribing mode of adoption, see note 46 L. R. A. (N. S.) 1134.

**17. Hawaii.** (See page 21.)



## CHAPTER II.

## SUCCESSION.

## LAW OF SUCCESSION.

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## 1. TAKING BY DESCENT.

(1) **In general.** Inasmuch as in the state of California all property real and personal descends to the heir subject only to the right of the personal representative to administer thereon, the rules of the common law system distinguishing between real and personal property in the matter of descent to the heirs do not apply in that state: *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732.

The words "next of kin" mean those who inherit under the statute of descents and distributions: *Bollinger v. Beacham*, 81 Kan. 752, 106 Pac. 1094.

The right to inherit is dependent upon the will of the legislature, subject to constitutional restrictions: *In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 793.

Property vests in the heirs of the decedent dying intestate immediately upon the death of such decedent: *Winters v. Winters*, 34 Nev. 324, 123 Pac. 17.

An heir can be disinherited only by express devise or necessary implication: *Love v. Walker*, 59 Or. 95, 115 Pac. 296.

Where a wife wrongfully abandoned by her husband dies without owning real property, the legal title to which the husband placed in her, the husband succeeds to a third of the property: *Somers v. Somers*, 27 S. Dak. 500, 131 N. W. 1091.

A release by an heir in the lifetime of the ancestor of his interest in the estate of the ancestor is inoperative under the South Dakota Civil Code, sections 215, 918, declaring that a mere expectancy of an heir apparent not coupled with an interest can not be transferred: *In re Thompson's Estate*, 26 S. Dak. 546, 128 N. W. 1127.

Though the legal title to property may vest in the heirs immediately upon the death of the ancestor, it rests subject to administration and is not absolute until after the process of administration: *Bickford v. Stewart*, 55 Wash. 286, 104 Pac. 263.



The rule in Shelley's case is not law in the territory of Hawaii: *Estate of Holt*, 19 Haw. 78; *Rooke v. Queen's Hospital*, 12 Haw. 375, 389.

The right to inherit, resting as it does upon public policy, is dependent entirely upon the will of the legislature, except so far as its power is restricted by constitutional provisions. Therefore, no one has the natural right to be the future heir of a living person: *In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 793.

It is the general rule that the right of the heir to take rests at once upon the death of the intestate and has been expressly recognized by the legislature of Montana, but the property of whatever kind it may be goes into the control of the district court and the possession of the administrator for the purposes of administration: *In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 793.

At the death of an intestate his real property descends at once to his heirs subject only to the payment of his debts, and the statute of limitations commences to run against them as from the death of the ancestor: *Parker v. Belts*, 47 Colo. 428, 107 Pac. 818.

Under B. & C. Comp., Secs. 1147, 1221, title to realty passes directly to the heirs as tenants in common subject to the administrator's possession to pay debts, but personalty goes to the administrator by operation of law: *DeBon v. Wallenberg*, 52 Or. 404, 97 Pac. 717.

The right of inheritance in the state of California is a matter entirely in the control of the legislature and depends wholly upon the provisions of the statutes, regardless of the court's notions of natural right and justice: *Estate of Kirby*, 162 Cal. 91, 121 Pac. 375.

The right to inherit is subject to legislative control: *Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335. (See page 38.)

(2) **Title passes, how.** Descent or hereditary succession is the title whereby one acquires his ancestor's estate by



right of representation as his heir: *Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335.

Title vests in heir or devisee from moment of death: *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 Pac. 292.

There is no difference, under laws, between realty and personalty: *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 Pac. 292.

Rule that title vests in heir or devisee from moment of death held applicable to personalty as well as to realty: *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 Pac. 292.

Heirs take incorporeal hereditaments subject to all conditions affixed thereto: *Payne v. Neuval*, 155 Cal. 46, 99 Pac. 476.

The heirs at law of a deceased stockholder are liable in a suit upon a judgment rendered against the company after the stockholder's death to the extent of the property inherited by them: *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74. (See page 40.)

**(3) Deflection of descent.** Under section 1386, subdivision 5, and section 1393 of the California Civil Code a cousin once removed of a deceased person does not stand in the same degree of kinship as the nephews and nieces of the deceased and is not entitled with them to succeed to the estate: *Estate of Moore*, 162 Cal. 324. Cousins inherit only through the parents of each and children can not inherit immediately from a cousin of their parent: *Cramer v. McCann*, 83 Kan. 719, 112 Pac. 832.

Cousins do not inherit immediately from each other, but only immediately through the parents of each, and children can not inherit immediately from a cousin of their parents: *Cramer v. McCann*, 83 Kan. 719, 112 Pac. 832.

Under subdivision 8 of section 1386 of the Civil Code, providing that property of a deceased widow who leaves no issue, which was the common property of herself and her deceased husband, shall go one-half to his kin, his surviving



sister and nieces and nephews take such half, although he devised all the community property to his wife: *Estate of Davidson* (Cal. App.), 131 Pac. 67.

Subdivision 8 of section 1386 of the Civil Code controls the succession to property left by a widow, which was the common property of herself and husband, although he devised all or a part thereof to her: *Estate of Davidson* (Cal. App.), 131 Pac. 67. (See page 40.)

## **2. WHAT PROPERTY DESCENDS. (See page 40.)**

### **3. RIGHTS OF WIDOW.**

**(1) In general.** (See page 44.)

**(2) As a survivor.** Proceeds of an insurance policy on life of decedent are separate property in which the widow has a right of dower: *Burdett v. Burdett*, 26 Okla. 416, 109 Pac. 922. (See page 45.)

**(3) Under agreement.** (See page 45.)

**(4) Election to take under will.** Where a widow fails to elect whether she will accept under the will or under the law she is held to have elected to take under the statute of descents and distributions: *Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074.

Where a widow renounced a will and elected to take under the statute, leaving the estate in such a condition that the remaining provisions of the will could not be enforced consistently with the testator's intention, they were disregarded and the whole estate distributed according to the statute: *Fennell v. Fennell*, 80 Kan. 730, 106 Pac. 1038.

Where the language of the will manifests no intention on the part of the testator to dispose of his wife's community interest and makes a testamentary disposition for her in lieu of such interest no election by the widow is necessary: *La Tourette v. La Tourette*, — Ariz. —, 137 Pac. 430.

Separate and community property were devised to wife, but the testator did not declare same to be in lieu of her



community right. Held that the fact that the wife also claims the right to succeed to one-half of certain other community property devised to others than herself does not preclude her from taking the property devised to her: *Estate of Prager*, 166 Cal. 450, 137 Pac. 37.

Where a widow, without regard to the provisions of the will of her deceased husband, elects to take under the law of descents and distributions, such election does not render the will inoperative. As between other persons, the will will be enforced as near in accordance with the intention of the testator as it can be: *Pittman v. Pittman*, 81 Kan. 643, 107 Pac. 235.

Where a widow renounces the will of her husband and elects to take under the law and her portion as provided by the statute of descents and distributions is set aside to her, if the estate is then in such a condition that the remaining provisions of the will can not be enforced consistently with the intent of the testator, they will be disregarded and the remainder of the estate will be distributed under the statute of descents and distributions the same as if no will had been made: *Fennell v. Fennell*, 80 Kan. 730, 106 Pac. 1038.

Where a wife has given her consent to her husband's making a will, it is not necessary that she should be called upon after his death to make an election under the statute, although she is not named as a beneficiary under the will: *Hanson v. Hanson*, 81 Kan. 305, 105 Pac. 444.

A widow provided for by her husband's will has the choice of two rights, one under the statutes of descents and distributions and one under the will; but she can not have both, except in cases where such is the purpose of the will. She may take either, but the election of one is a relinquishment of the other: *Ashelford v. Chapman*, 81 Kan. 312, 105 Pac. 534.

The widow's election is between will and no will. If she takes under the statute, there is no will as to her, and none of her rights can be abridged as to any of its provisions. Her



share is carved out of the estate according to law, precisely as if no will had been made. Then the will operates upon the residue: *Ashelford v. Chapman*, 81 Kan. 312, 105 Pac. 534. (See page 46.)

(5) **Construction of statutes.** A tract of land patented to two married men in the state of Washington, after the enactment of the community property law of that state, is the common property of the parties and their wives and is not held under a joint tenancy with the right of survivorship, and upon the death of one of the patentees his interest descends to his widow and children under the laws of descent, and not to the surviving owner: *Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858.

Where an interlocutory decree of divorce has been awarded a wife, but she dies before such decree is made final, the right of the husband to inherit is not affected: *In re Seiler's Estate*, 164 Cal. 181, 128 Pac. 334.

Although it is provided by section 132. Civil Code, that the death of either party to a divorce action, after the entry of the interlocutory judgment, does not impair the power of the court to enter final judgment, the purpose of this provision is not entirely clear. The entry of such final judgment will not be allowed to operate retroactively so as to take away rights of inheritance which had, by the death, become vested in the surviving spouse: *In re Seiler's Estate*, 164 Cal. 181, 128 Pac. 334.

The statute of succession in the state of California in providing for the disposition of the separate property of one dying intestate makes no distinction based upon the channel through which the property may have come to the decedent. "Succession to estates is purely a matter of statutory regulations which can not be changed by the court": *In re Jobson's Estate*, 164 Cal. 312, 128 Pac. 938. (See page 46.)

#### 4. CHILDREN'S RIGHT OF INHERITANCE.

(1) **In general.** Where decedent who had been twice married died leaving a widow and child by the first mar-



riage and his property had been acquired by the joint industry of himself and the second wife, the child by the first marriage constituted issue within Comp. Laws. 1909, section 8985, relating to distribution of assets of estates: *Schafer v. Ballou*, 35 Okla. 169, 128 Pac. 498. (See page 46.)

A testator who dies leaving children and by his will leaves all his property to his wife "to have and to hold the same during her natural life or to sell and convey the said property for the benefit of herself and her heirs," dies intestate so far as his children are concerned; the word "heirs" used in the will not being the equivalent of "children" under section 5554, B. & C. Comp.: *Neal v. Davis*, 53 Or. 423.

Upon the death of a wife one-half of the community property (a homestead) descends to the children who become tenants in common: *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635; *Kreig v. Lewis*, 56 Ida. 196, 105 Pac. 483.

An heir can be disinherited only by express devise or necessary implication: *Love v. Walker*, 59 Or. 95, 115 Pac. 302.

A child of the former marriage would be entitled to her proper share according to the laws of succession, as to the estate of which her father died seised: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

(2) **Heirs of half blood.** (See page 47.)

#### REFERENCES.

Descent and distribution among kindred of the half blood, see note 26 L. R. A. (N. S.) 603.

### 10. INHERITANCE BY CONVICT.

A person who has been convicted of the crime of manslaughter in killing the decedent is not deprived of his right of succession by reason of the provisions of section 1409 of the Civil Code providing that "no person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate": *Estate of Kirby*, 162 Cal.



91, 121 Pac. 370. In the state of Kansas where a murderer is imprisoned under a life sentence his estate is administered in all respects as though he were naturally dead: *Dobbs v. Lilley*, 86 Kan. 513, 121 Pac. 505.

The word murderer as used in such section has the technical meaning given it in the definition embodied in section 187 of the Penal Code. (See page 51.)

#### REFERENCES.

Homicide as affecting devolution of property, see note 39 L. R. A. (N. S.) 1088.

### 11. INHERITANCE BY ALIENS.

Inasmuch as the right to inherit is dependent on the will of the legislature subject to constitutional restrictions, it is only by grace of the state in which the lands may be that they can be inherited by an alien or foreigner, and when a legislature confers such privileges it may qualify them with any conditions or burdens it chooses even after the right has vested, provided it does not deny due process of law: *In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 793.

A nonresident alien can not take by succession under section 5715, Revised Codes of Idaho, unless he appear and claim such succession within five years from the death of the decedent; but resident aliens take equally with citizens in all cases by succession: *Connolly v. Probate Court*, 25 Ida. 35, 136 Pac. 210.

Under the provisions of the alien land act of Kansas (chapter 3 of the Laws of 1891), resident citizens of the United States could not inherit lands in that state through the operation of the statute of descents and distributions, when they must trace their descent through a cousin of their parents who was an alien at the time of his death: *Cramer v. McCann*, 83 Kan. 719, 112 Pac. 832. (See page 52.)

### 12. INHERITANCE BY INDIANS.

An allotment of a duly enrolled Creek Indian who died after receiving her patent, not being a "new acquisition,"



passed to her parents, who took title to the exclusion of her brothers and sisters: *Pigeon v. Buck*, 38 Okla. 101, 131 Pac. 1083.

Where a Creek freedman whose father was a Seminole was enrolled and an allotment selected to which patent was issued, held that under the supplemental Creek agreement, sections 7, 8, the allotment passed to the heirs of the allottee's mother and that the devolution of the estate was governed by Mansf. Dig. Ark., Ch. 40: *Iowa Land and Trust Co. v. Dawson*, 37 Okla. 593, 134 Pac. 39.

A husband not a member of the Creek nation may inherit land as his wife's heir under the Creek law of descent and distribution: *Woodward v. De Graffenreid*, 36 Okla. 81, 131 Pac. 162.

Chapter 49 of the law of Arkansas (Mansf. Dig.) entitled "Descent and Distribution" controls the descent of land allotted to a member of the Seminole tribe of Indians not of Indian blood, who died after receiving his allotment: *Heliker-Jarvis Seminole Co. v. Lincoln*, 33 Okla. 425, 126 Pac. 723.

Under original Creek treaty the land of a Creek woman who died leaving a husband, a white man, and a daughter, descended as if the woman had died after the treaty was ratified: *Merley v. Fewel*, 32 Okla. 452, 122 Pac. 700.

The laws of descent and distribution of the Creek nation having been made to apply, as to the distributive share of certain allotted lands and funds of said tribe by section 28 of the act of Congress of March 1, 1901, the courts of the state of Oklahoma take judicial knowledge of such laws and customs of the Creek nation: *Scott v. Jacobs*, 31 Okla. 109.

The rights of daughters of Creek blood of a deceased Creek allottee under Act of Congress, June 30, 1902, section 6, are determined in the case of *Hughes Land Co. v. Bailey*, 30 Okla. 194, 120 Pac. 290.

The course of descent of an allotment taken by a Creek Indian who died March 1, 1900, is determined under "origi-



nal agreement'' of May 27, 1901: *Divine v. Harmon*, 30 Okla. 820, 121 Pac. 219.

A citizen of the Creek nation in possession of lands in said nation who files thereon before the Commission to the Five Civilized Tribes under an Act of Congress approved June 28, 1898, and dies April 28, 1900, without receiving his certificate of allotment therefor, is seized of no estate of inheritance and courtesy therein does not attach: *Sanders v. Sanders*, 28 Okla. 59, 117 Pac. 338.

Lands of certain Indian allottees under section 28 of the original agreement of the Creeks ratified by Act of Congress March 1, 1901, which were allotted prior to the supplemental agreement ratified by Act of Congress June 30, 1902 (32 U. S. Stats. at Large, p. 500) descend under the Creek law of descents and distribution: *Hooks v. Kennard*, 28 Okla. 457, 114 Pac. 744; *Lamb v. Baker*, 27 Okla. 739, 117 Pac. 189.

The land allotted to a dead minor Creek freedman, who was living on April 1, 1899, and who died without issue, descends to his mother as his nearest relative: *Irving v. Diamond*, 23 Okla. 325, 100 Pac. 557.

Where lands were granted to an Indian by a patent subject to forfeiture if the lands were abandoned and restricting the right of alienation for a certain period and until removed by legislative act and subsequently exercise of the power of alienation was provided for, the determination of the question of heirship of a deceased allottee by the interior department is final and *res adjudicata*: *Little Bill v. Swanson*, 64 Wash. 650, 117 Pac. 481.

An infant Creek freedman who died unmarried, without issue, and intestate had an allotment selected for her. Her father was a Seminole and a non-member of the Creek nation. Held that by virtue of the provisions of sections 7 and 8 of the supplemental Creek Treaty (Act June 30, 1902, Ch. 1322, 32 Stats. 500) her allotment passed to the heirs of her mother to the exclusion of her father: *Iowa Land and Trust Co. v. Dawson*, 37 Okla. 593, 134 Pac. 39.



The census card issued by the Dawes commission showed L. T., a member of the Five Civilized Tribes, to be the father of S. T., a deceased allottee. Held that evidence tending to establish that S. T. was an illegitimate child, introduced for the purpose of changing the descent from the putative father to the mother was competent: *Mullen v. Short*, 38 Okla. 333, 133 Pac. 230.

A duly enrolled Creek freedman, a minor, died July 2, 1899, without a surviving widow or children, his allotment not then having been selected. On August 15, 1902, his distributive share of land as a member of said tribe was allotted to his heirs. On April 8, 1905, his father and mother, who were his surviving heirs, executed a warranty deed covering said allotment. The grantee sold and gave possession of the land. The father and mother then brought suit for ejectment and possession. Held that the land passed to them free from restrictions; that same was alienable when they sold it and that they could not maintain their action: *Reutie v. McCoy*, 35 Okla. 77, 128 Pac. 244.

Under the laws existing in the Indian Territory at the time of the creation of the state (Mansf. Dig., Sec. 2522 [Ind. T. Ann. Stats. 1899, Sec. 1820]), the personal estate not disposed of nor otherwise limited by marriage settlement, when a person dies intestate, descends to be distributed in parcenary to his or her kindred, male and female, subject to the payment of his or her debts, etc., and where there are no debts and neither letters of administration applied for nor granted, the heirs may maintain an action to recover such personalty: *First Nat. Bank of Muskogee v. Teirs*, 29 Okla. 714, 119 Pac. 218.

Where lands were allotted to Creek Indians prior to the supplemental agreement made with the Creek nation, ratified in 1902 by Act of Congress approved June 30, 1902, after the death of such Indians, the Creek law of descents and distributions determines the heirs and their shares: *Hooks v. Kennard*, 28 Okla. 457, 114 Pac. 744.

Section 2 of the Act of Congress approved June 2, 1900, entitled, "An act to ratify an agreement between the Com-



mission to the Five Civilized Tribes and the Seminole Tribe of Indians'' (Act June 2, 1900, Ch. 610, 31 Stats. 250), controls the descent of land to which a duly enrolled member of the Seminole tribe of Indians who died after the 31st of December, 1899, before receiving his allotment, is entitled; but said section has no application to and does not control the descent of land allotted to a member of said tribe of Indians who died after said date but who received his allotment prior to his death: *Bruner v. Sanders*, 26 Okla. 673, 110 Pac. 730.

The descent and distribution of the allotted lands of an enrolled Creek Indian who died before the ratification of the original Creek Treaty (Act March 1, 1901, Ch. 676, 31 Stats. 861) and who had during her lifetime allotted to her under section 11 of the Curtis Act (Act June 28, 1898, Ch. 517, 30 Stats. 495) the use and occupancy of the surface of the allotment which was thereafter by section 6 of the original Creek Treaty ratified and deed issued to her heirs therefor, is, by reason of section 28 of the original Creek Treaty, regulated and controlled by the law of descent and distribution of the Creek nation: *Barnett v. Way*, 29 Okla. 780, 119 Pac. 418.

Under the laws of the Creek nation in force in February, 1902, an intermarried non-citizen husband of a citizen of the Creek nation, who on said date died intestate, leaving brothers and sisters, but no father, mother, or children, is entitled to an undivided one-half of the allotted lands of his deceased wife, and to possession until such lands are distributed according to law under Act March 1, 1901, Ch. 676, Sec. 6, 31 Stats. 863, and Comp. Laws Creek Nation 1900, Ch. 10, Sec. 8: *Bodle v. Shoenfelt*, 22 Okla. 94, 97 Pac. 556.

The non-citizen widow of an allottee of land of the Creek nation whose husband in June, 1906, is entitled to dower in his estate and until it is assigned to her is entitled to remain and possess the home or house of her late husband, together with the farm thereunto attached, free from all rent: *Hawkins v. Stevens*, 21 Okla. 849, 97 Pac. 567.

Where non-citizen Creek allottee executes a will of her homestead, naming therein her husband as sole devisee, and dies leaving her surviving an only child by a former husband,



born prior to the 25th day of May, 1901, such child is the sole heir of such allottee and is entitled to the whole of her estate as if she had died intestate, under the provisions of Sec. 6500, Mansf. Dig. (Ind. T. Ann. Stats. 1899, Sec. 3572) relating to pretermitted children: *In re Brown's Estate*, 22 Okla. 216, 97 Pac. 613. (See page 53.)

#### 14. INHERITANCE BY OR THROUGH ILLEGITIMATE CHILDREN.

(1) **Right of—Acknowledgment.** At common law a bastard could not be the heir of any one, nor could he have heirs except of his own body, but this rule does not now subsist in Oregon: *State v. McDonald*, 59 Or. 520, 117 Pac. 283. (See page 55.)

#### REFERENCES.

Rights of lineal descendants of illegitimate to inherit through him, see note 27 L. R. A. (N. S.) 220.

(2) **Succession to estate of illegitimate not acknowledged or adopted.** (See page 55.)

(3) **Sufficiency of acknowledgment—Evidence of recognition.** Under the laws of the state of Kansas illegitimate children inherit from the mother, and the mother from the children. But the children also inherit from the father whenever they have been recognized by him as his children; but such recognition must have been general and notorious or else in writing. Held in this case that the evidence of such recognition was sufficient to establish the parentage in question: *McLean v. McLean*, — Kan. — 140, 140 Pac. 849. (See page 55.)

(4) **Presumption as to legitimacy.** (See page 56.)

(5) **Illegitimacy. How inferred.** (See page 57.)

(6) **Construction of Utah statute.** (See page 57.)

(7) **Right of nonresident alien.** (See page 57.)

(8) **Pretermitted illegitimate child.** (See page 58.)



### 15. WHAT LAW GOVERNS.

As a rule the disposition is governed by the *lex domicilii* decedentes and the descent of real property by the *lex rei sitae*: *State v. McDonald*, 59 Or. 520, 117 Pac. 281; *Hohn v. Bidwell*, 27 S. Dak. 249. (See page 58.)

### 16. PROCEDURE AND EVIDENCE.

In a proceeding between the heirs of a deceased husband and those of his deceased wife to determine heirship to his estate, a finding that a certain tract of land was the separate property of the husband and not the property of the community is a finding of fact and not a conclusion of law: *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690.

Statements by members of decedent's family concerning family history and relationship, made after the controversy as to the right of the estate of decedent had arisen and in reply to questions propounded to elicit evidence are inadmissible; such declarations being admissible to prove pedigree or relationship, only when made naturally and spontaneously before any controversy has arisen: *In re Walden's Estate*, 166 Cal. 446, 137 Pac. 35.

It is not required that a petition for the determination of heirship under the Colorado statute (Rev. Stats., Sec. 7050) shall be answered or met by plea. The decree is simply a determination of who are the heirs of the deceased: *Wilson v. Wilson*, 55 Colo. 70.

Under section 5119, Rev. Codes 1905 (North Dakota) it is held that parol testimony is admissible to establish the fact that the omission of a child from the will was intentional: *Schultz v. Schultz*, 19 N. Dak. 688.

Under Mansf. Dig., Sec. 2522 (Ind. T. Stats. 1899, Sec. 1820) heirs are entitled to maintain action to recover personality of an intestate: *First Nat. Bank v. Tevis*, 29 Okla. 714, 119 Pac. 218.



One claiming as heir must make proof of his relationship to the intestate by sufficient evidence, but a preponderance is sufficient: *In re Clark's Estate* (Cal. App.), 110 Pac. 828.

Evidence of admissions and declarations of deceased and of other relatives held sufficient proof: *In re Clark's Estate* (Cal. App.), 110 Pac. 828.

Evidence sufficient to show that B was decedent's niece and that two persons were brothers: *In re Hartman's Estate*, 157 Cal. 206, 107 Pac. 105.

During the lifetime of their father, an agreement was entered into between children that they should ignore his will in the event that he made one, and then share his estate equally as if he had died intestate, but under this agreement a final distribution of the parent's estate was a condition precedent to an action on the contract; where the executor refused to apply for distribution when the estate was in a condition to be finally closed, it was held that this constituted a breach of contract, giving a right of action to the other children under their agreement, as the terms of the agreement necessarily implied that a general distribution of the estate should be made within a reasonable time, and the executor would not be allowed to interfere with the rights of the other parties to the contract by a refusal to apply for a final distribution of the estate: *Spanzenberg v. Spanzenberg*, 19 Cal. App. 439, 126 Pac. 379.

In a proceeding to determine succession the decision of the trial court upon the conflicting evidence is conclusive and that even if it be conceded that the appellate court may weigh the evidence where all the testimony is given by deposition, the testimony was not of such a character as to justify a reversal of the decision upon the ground of abuse of discretion: *Estate of Walden*, 166 Cal. 446, 137 Pac. 35.



## CHAPTER III.

## ESCHEAT AND PROCEEDINGS RELATIVE THERETO.

1. General doctrine.
2. Jurisdiction probate courts.
3. Property of outlawed corporations.
4. Land of Mormon Church.
5. Aliens.
6. Premature action.
7. Nonresident aliens.
8. Pleading and practice.
9. Judgments.
10. Limitation of actions.
11. Recovery of escheated property and proceedings thereunder.

1. **General doctrine.** The right of the state to escheat and hold the property of absentee depositors in a bank is as ample and rests upon as sound reasons of public policy as its right to escheat the property of persons who have died leaving no known heirs: *State v. First Nat. Bank*, 61 Or. 551, 123 Pac. 714.

The statute of Oregon providing for the escheat to the state of deposits in national banks unclaimed for seven years is not unconstitutional as being in violation of the United States laws against "visitorial" legislation by the states: *State v. First Nat. Bank*, 61 Or. 551, 123 Pac. 714.

2. **Jurisdiction of probate courts.** The jurisdiction of the county courts in probate in the state of Oregon is derived from the constitution and the legislature has no power to deprive them thereof, and any attempt to do so is unconstitutional and void and the determination of heirship as to personalty is part of the primary and fundamental jurisdiction of those courts: *State v. McDonald*, 55 Or. 419, 104 Pac. 972.

The circuit court in Oregon has jurisdiction to adjudicate upon the devolution of the title to realty, which the action



of the county court can not effect: *State v. McDonald*, 55 Or. 419, 104 Pac. 972. (See page 68.)

**3. Property of outlawed corporations.** (See page 70.)

**4. Land of Mormon Church.** (See page 70.)

**5. Aliens.** (See page 70.)

**6. Premature action.** (See page 71.)

**7. Nonresident aliens.** (See page 70.)

**8. Pleading and practice.** The state is an "interested party" in the matter of the distribution of an intestate's estate to the extent that it may appear on the hearing of an application for an order of distribution to claim that the decedent left no heirs, before the right of the state has been determined in an escheat action: *In re Estate of John McClellan*, 31 S. Dak. 653. See, also, *In re McClellan's Estate*, 27 S. Dak. 109.

Under the provisions of Sec. 5716, Rev. Codes of Idaho, the personal property of the deceased, when succession is not claimed as provided by that section, may be reduced to the possession of the state to be disposed of as provided by such section: *Connolly v. Probate Court*, — Idaho —, 136 Pac. 210.

Where in escheat proceedings the claimants or defendants proceed to a joint trial without objection they are not in a position to claim a separate trial on appeal: *State v. McDonald*, 55 Or. 419, 104 Pac. 971.

A proceeding to escheat the property of a deceased person for want of heirs, under the statute of Oregon, is a proceeding at law and not in equity: *State v. McDonald*, 55 Or. 419, 104 Pac. 973. (See page 72.)

**9. Judgments.** (See page 73.)

**10. Limitation of actions.** (See page 73.)

**11. Recovery of escheated property.** (See page 74.)







## **PART II.**

### **GUARDIAN AND WARD.**

#### **CHAPTER I.**

##### **GUARDIANSHIP OF MINORS.**

##### **MINORS AND THEIR CUSTODY, GUARDIANS, COMMITMENT, AND HABEAS CORPUS.**

- 1. Kinds of guardians.**
- 2. Guardian ad litem.**
  - (1) Who is, virtually.**
  - (2) Application of statutes.**
  - (3) Appointment and duty of court.**
  - (4) No presumption as to appointment.**
  - (5) Validity of appointment.**
  - (6) Appearance for ward. Waiver of notice.**
  - (7) Appeal. Affirmance of judgment.**
- 3. Testamentary guardian.**
  - (1) Guardian appointed by deed is.**
  - (2) Mother's incapacity to appoint.**
  - (3) Mother's consent to father's appointment.**
  - (4) Powers of. Validity of acts.**
- 4. Commitment of infants.**
- 5. Habeas corpus for custody of children.**
  - (1) Nature of proceeding.**
  - (2) Jurisdiction of courts. Temporary order.**
  - (3) What matters, only, will be considered.**
  - (4) Welfare of infant controls.**
  - (5) Awarding child to proper custody.**
  - (6) Attacking adoption proceedings.**
  - (7) Attacking guardianship proceedings.**
  - (8) Discharge and dismissal of writ.**
  - (9) Former adjudication as res judicata.**
  - (10) Writ of prohibition.**
  - (11) Appeal.**
- 6. Marriage of minor.**
- 7. Contempt of court.**



## 1. KINDS OF GUARDIANS. (See page 85.)

### 2. GUARDIAN AD LITEM.

(1) **Who is virtually.** Judgment obtained by one assuming to act as guardian ad litem is not void, and no proof of appointment is essential: *Skinner v. Knickrehm*, 10 Cal. App. 596, 102 Pac. 947. (See page 85.)

#### REFERENCES.

As to the position and powers of a guardian generally, see note to *Credle v. Bangham*, 133 Am. St. 802-5.

(2) **Application of statutes.** At common law an infant plaintiff sued by guardian ad litem but under the laws of Montana he sues either by his general guardian or a guardian ad litem: *Melzner v. N. P. Ry. Co.*, 46 Mont. 162, 127 Pac. 148.

Sections 2907, 2908, Comp. Laws of Utah 1907, contemplate and provide for the appointment of a guardian ad litem for resident and non-resident minor plaintiffs as well as resident and non-resident minor defendants: *Schuyler v. So. Pac. Co.*, 37 Utah 581, 109 Pac. 461.

Under Secs. 4229, 4937, Wilson's Rev. & Ann. Stats. 1903 of Oklahoma, a minor may institute and prosecute a suit in a justice court by some adult as his next friend or by guardian ad litem appointed by the justice before whom the action is brought: *Hill v. Reed*, 23 Okla. 616, 103 Pac. 855. (See page 86.)

(3) **Appointment and duty of court.** Under sections 1983, 1985-1987 Comp. Laws 1897 N. Mex., it is the duty of the district court on appeal from a judgment of the probate court dismissing a petition to revoke the probate of a will, to appoint a guardian ad litem for an infant petitioner whose infancy is first disclosed at the trial; and a motion to dismiss the proceedings should not be sustained, notwithstanding the infant refused to apply for such appointment: *In re Dye's Will*, 16 N. Mex. 297, 120 Pac. 306.



Where it develops at the trial that a plaintiff is a minor and his counsel moves for the appointment of a guardian it is error for the court to dismiss the case on defendant's motion. The appointment of a guardian ad litem is a matter within the discretion of the court and on motion it became its duty to appoint a guardian ad litem or allow the case to proceed as it had begun. Judgments rendered for or against minors are not void but voidable: *Kingsbach v. Casey*, 66 Wash. 643, 120 Pac. 108.

The discretion of the court to be exercised in respect of permitting or refusing to permit an action to proceed, by appointing or refusing to appoint a guardian, does not extend to a refusal to make the appointment and to assume jurisdiction of the action when a prima facie right to prosecute it is made to appear. It is the duty of the court to guard carefully the rights of those who can not act upon their own judgment: *State v. District Court*, 38 Mont. 166, 99 Pac. 295.

Under Code Civ. Proc., Sec. 372, court may appoint "in any case, when it is deemed by court in which action or proceeding is prosecuted, or by judge thereof, expedient to represent infant": *In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 466. (See page 86.)

**(4) No presumption as to appointment.** (See page 87.)

**(5) Validity of appointment.** The power of a valid authorization to bring suit for specific injuries is not exhausted by a nonsuit as to the original defendant and the substitution of a new one: *Skinner v. Knickrehm*, 10 Cal. App. 596, 102 Pac. 947.

In an action by a guardian ad litem, it is not necessary to show that he has filed a bond, taken an oath, or received letters of guardianship; it is sufficient to show that he has filed a petition for appointment, and that the court made an order appointing him: *Foley v. Northern California P. Co.*, 165 Cal. 103, 130 Pac. 1183. (See page 87.)

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**(6) Appearance for ward. Waiver of notice.** (See page 87.)

**(7) Appeal. Affirmance of judgment.** (See page 88.)

### 3. TESTAMENTARY GUARDIAN.

**(1) Guardian appointed by deed is.** The right to appoint a guardian of a minor by will or deed is statutory, and under section 241 of the Civil Code, a guardian of a legitimate child may be so appointed "by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent": *Matter of Allen*, 162 Cal. 625, 124 Pac. 237. (See page 88.)

**(2) Mother's incapacity to appoint.** Under section 241 of the Civil Code, a mother is authorized to appoint a testamentary guardian of a minor child only in the event that the father is dead or incapable of acting. This condition must exist at the date of the mother's death, or at least when her will is probated: *Matter of Allen*, 162 Cal. 625, 124 Pac. 237.

A mother to whom a decree of divorce has awarded the custody of a minor child has no right to appoint a testamentary guardian thereof, if the father of the child was alive at the time of her death. Such an attempted appointment is entirely without force or effect, and did not become operative upon the subsequent death of the father: *Matter of Allen*, 162 Cal. 625, 124 Pac. 237.

In such a case the primary consideration for the guidance of the court is "the best interest of the child with respect to its temporal and its mental and moral welfare," and the conclusion reached by the court will not be set aside on appeal unless it was reached as the result of an abuse of discretion. In reaching its conclusion the court may take into consideration a preference expressed by the minor, even though the child was under the age of fourteen: *Matter of Allen*, 162 Cal. 625, 124 Pac. 237. (See page 89.)

**(3) Mother's consent to father's appointment.** (See page 90.)



**(4) Powers of. Validity of acts. (See page 90.)****4. COMMITMENT OF INFANTS.**

Under the statute of Washington (Comp. Stats. 1910, Sec. 3128) providing that "it shall be lawful for and in the discretion of the district court of any county to commit to" the house of refuge or reform or industrial school of any state, where provision has been or shall be made, "any child being a legal resident of said county, and being between the ages of ten and sixteen years, who upon complaint and due proof, is found to be a vagrant or so incorrigible and vicious that a due regard for the morals and welfare of such child manifestly requires that he or she shall be committed to said house of refuge, or reform or industrial school," the jurisdiction is limited to cases where the child is a legal resident of the county in which the court is sitting. It is a summary proceeding not conducted according to the course of the common law and is not within the general jurisdiction of the district court. In such cases the presumption as to jurisdiction in support of judgments of superior courts of general jurisdiction does not apply and that the court had jurisdiction must therefore appear by the record: *Kelsey v. Carroll*, — Wyo. —, 138 Pac. 868.

Where a petition, praying that a minor be taken into custody as a dependent child, fails to state any of the facts required by statute to constitute the child a dependent, an order of the juvenile court committing him to the custody of the probation officer is without jurisdiction and the child will be released on habeas corpus: *Ex parte Burner*, 23 Cal. App. 637, 138 Pac. 90. (See page 91.)

**5. HABEAS CORPUS FOR CUSTODY OF CHILDREN.**

**(1) Nature of proceedings.** The legal presumption is that it is for the best interests of the child and of society for the child to remain with its natural parents during the period of its minority and be maintained, cared for, and educated by them under their supervision and direction; though there is no absolute right in the parents in this regard: *Hammel v. Parrish*, — Utah —, 134 Pac. 901. (See page 92.)



(2) **Jurisdiction of courts. Temporary order.** Where a husband who had separated from his wife obtained possession of their child without her consent and took it into another state the trial court, both parties being within its jurisdiction, has authority under a writ of habeas corpus to compel the return of the child, and its production in court: *Breene v. Breene*, 51 Colo. 342, 117 Pac. 1002. (See page 92.)

(3) **What matters only will be considered.** (See page 93.)

(4) **Welfare of infant controls.** In determining to whom the custody of a child should be awarded its welfare is to be regarded more than the technical legal right of the parent; but where an application made by a father for the custody of his child after the death of its mother is resisted by a third person on the ground that the father is immoral and unfit to have its custody he will not be deprived of such custody unless the objection is sustained by clear and satisfactory proof: *Pinney v. Sulzen*, — Kan. —, 137 Pac. 987.

In determining the right to the custody of a child as between one parent and a third person who has adopted it with the consent of the other parent, which adoption has been approved by the court in a divorce decree subsequently rendered, the wishes of the parent will be subordinate to the moral, intellectual, and material welfare of the child.

It is not sufficient to establish the unfitness of a parent for the custody and control of his minor child, to show that he has some faults of character or bad habits; it must be shown that his condition in life or his character and habits are such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, can not be reasonably expected at the parent's hands: *Jamison v. Gilbert*, 38 Okla. 751, 135 Pac. 342.

When a parent has surrendered the control of his child when it was a toddling infant to other parties and permitted them to maintain, clothe, feed, and care for it until it is eight or nine years of age and a strong reciprocal mutual affection has grown up between the child and its foster parents, and the parent seeks to recover possession of the



child, the natural or presumptive right of the parent can not prevail if the interest and welfare of the child forbid it. The law in such cases regards the welfare and permanent interests of the child as much more important than the natural or presumptive right of the parent: *Hammel v. Parrish*, — Utah —, 134 Pac. 901.

A parent may by contract legally transfer and surrender his infant child into the custody of another where the interest of the child is not prejudiced by the transaction, and in all controversies arising respecting the custody of the child after such transfer and surrender have been made, the paramount consideration—the question of controlling importance—is the interest, welfare, and happiness of the child: *Stanford v. Gray*, — Utah —, 129 Pac. 426.

In determining the custody of a child, his welfare is the paramount consideration. Even parental love must yield to the claims of another, if, after due judicial investigation, it is found that the highest good of the child requires it: *Hickey v. Thayer*, 85 Kan. 556, 118 Pac. 56.

In controversies affecting the custody of an infant, the interest and welfare of the child is the primary and controlling question by which the court must be guided: *Wilson v. Mitchell*, 48 Colo. 454, 111 Pac. 25.

The paramount right of the parent must, however, in all cases be held subordinate to the welfare of the child: *State v. Bell*, 58 Wash. 575, 109 Pac. 51. (See page 94.)

#### REFERENCES.

Denial of custody of child to parent for its well being, see note 41 L. R. A. (N. S.) 564.

(5) **Awarding child to proper custody.** Courts will not disturb the family relation, nor take a child from its parent merely because a third person, seeking its custody, may have large means and is therefore able to give the child greater comforts, wider education, and the promise of a larger inheritance: *Pinney v. Sulzen*, — Kan. —, 137 Pac. 987.



The legal right of the mother of a minor child, its father being dead, to its custody and control, is superior to that of a third person whose claim is based upon the fact that he has cared for and supported the child for some two or three years: *In re Butler*, — Okla. —, 137 Pac. 673.

The husband, whose wife undertook the care of an infant child for an uncertain compensation, and who cared for and supported it for two or three years, has no legal right to the custody of such child against the claims of its mother, and the mother having obtained its custody, can not be deprived thereof by writ of habeas corpus: *In re Butler*, — Okla. —, 137 Pac. 673.

A person who is a suitable person for the purpose is entitled to the custody of a child as a matter of right, as against any one not its parent, irrespective of the question whether it might be better provided for by some one else who is willing to assume the obligation: *Ex parte Hollinger*, — Kan. —, 132 Pac. 1181.

The right of a father to the custody and services of his child is subject to the welfare of the child and in furtherance thereof the court may give the child into the custody of the mother in preference to that of the father: *Breene v. Breene*, 51 Colo. 342, 117 Pac. 1002.

The unfitness which will deprive a parent of the right to the custody of his minor child must be positive and not comparative; and the mere fact that his minor child might be better cared for by a third person is not sufficient to deprive the parent of his right to its custody: *Jamison v. Gilbert*, 38 Okla. 751, 135 Pac. 342.

Upon the death of a parent to whom upon the granting of a divorce, the custody of a child has been awarded, the right to its custody accrues to the other parent, if a suitable person for that purpose: *Ex parte Hollinger*, — Kan. —, 132 Pac. 1181.

Where a parent in writing voluntarily relinquishes and surrenders the custody of his infant child to the custody of another, he can not recover the custody of the child in his



own right; and where he comes before the court for that purpose the burden is upon him to show, not on his own behalf, but on behalf of the child, that it is not being properly cared for: *Stanford v. Gray*, — *Utah* —, 129 *Pac.* 428.

By natural law, by common law, and likewise by the statutes of the state of Colorado, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be intrusted with their care, control, and education, or when some exceptional circumstances appear which render such custody inimicable to the best interests of the child: *Wilson v. Mitchell*, 48 *Colo.* 454, 111 *Pac.* 26.

On habeas corpus by a mother for custody of a child, respondents can not rely on pending proceedings under *Rem. & Bal. Code*, Sec. 1701, to adjudge custody of the child as one abandoned, where no process has been served in that proceeding, no date for final hearing fixed, and no final order made; the society to which custody was temporarily awarded in such proceeding acquiring no rights available as a defense to the habeas corpus proceedings: *State v. Reynolds*, 60 *Wash.* 12, 110 *Pac.* 634.

The fact that the father required the children to assist in the ordinary work in and about the home, and the fact that the stepmother is strict in disciplining the children, do not offer sufficient reasons for awarding the custody of the boy to the grandmother: *State v. Bell*, 58 *Wash.* 575, 109 *Pac.* 52.

Where a child has been brought up by foster parents in an environment that is distinctly different from that to which he would be submitted by restoring him to the care of his mother a revulsion of feeling would be liable to occur which would lead to embarrassment and misery and under the circumstances of the case the foster parents are entitled to retain the custody of the child: *Ex parte Fields*, 56 *Wash.* 259, 105 *Pac.* 469.



After the death of the mother, to whom the custody of the child had been given by a decree of divorce, the father being a suitable person is the proper person to have the custody of the child as against the mother's parents: *Ex parte Barnes*, 54 Or. 548, 104 Pac. 297. (See page 94.)

- (6) **Attacking adoption proceedings.** (See page 96.)
- (7) **Attacking guardianship proceedings.** (See page 96.)
- (8) **Discharge and dismissal of writ.** (See page 97.)
- (9) **Former adjudication as res judicata.** (See page 97.)
- (10) **Writ of prohibition.** (See page 98.)

(11) **Appeal.** The supreme court of the state of Oklahoma has jurisdiction on appeal to review an order of the district court awarding the custody of a minor child to one of the parties in a habeas corpus proceeding, brought for the purpose of determining who has the right to the custody and control of such minor: *Jamison v. Gilbert*, — Okla. —, 135 Pac. 312. (See page 98.)

## 6. MARRIAGE OF MINOR.

A minor on marrying becomes of lawful age so that he can sue in his own name: *Ex parte Hollopeter*, 52 Wash. 41, 100 Pac. 162, 132 Am. St. 952.

## 7. CONTEMPT OF COURT.

Appearing in court in response to a writ of habeas corpus and refusing to produce the body of a child pursuant to the requirements of such writ, without a reasonable excuse, or willfully making an evasive or insufficient answer thereto, is a contempt committed in the presence of the court: *Smythe v. Smythe*, 28 Okla. 266, 114 Pac. 257.



## CHAPTER II.

GUARDIANSHIP OF MINORS (CONTINUED). (See page 99.)

§ 70. Appointment of guardian by court after hearing.

§ 104a. Guardian of estate of minor, etc. Notice to relatives, of what.

**§ 70. Appointment of guardian by court after hearing.** If, after a full examination and hearing upon such petition, it appears to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate or person or estate, with the powers and duties in this chapter specified.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1941), § 1764.**

**§ 104a. Guardian of estate of minor, etc. Notice to relatives, of what.** At any time after the issuance of letters of guardianship upon the estate of any minor, insane or incompetent person, any relative of the ward, or the attorney for such relative, may serve upon the guardian, or upon the attorney for the guardian, and file with the clerk of the court wherein administration of such ward's estate is pending, a written request, stating that he desires special notice of any or all of the following mentioned matters, steps or proceedings in the administration of said estate, to wit:

1. **Filing of petitions for sales, leases or mortgages of any property of the ward's estate.**

2. **Filing of accounts.**

3. **Filing of application for removal of ward's property to any foreign jurisdiction.**

4. **Filing of petitions for partition of any property of the ward's estate.**

5. **Proceedings for removal, suspension or discharge of the guardian, or final determination of the guardianship.**



**[Written request shall contain what. Service.]** Such request shall state the post office address of such relative, or his attorney, and thereafter a brief notice of the filing of any of such petitions, applications, or accounts, or proceedings, except petitions for sale of perishable property, or other personal property which will incur expense or loss by keeping, shall be addressed to such relative, or his attorney, at his stated post office address, and [1] deposited in the United States post office with the postage thereon prepaid, within two days after the filing of such petition, account, application, or the commencement of such proceeding; or [2] personal service of such notices may be made on such relative, or his attorney, within said two days, and such personal service shall be equivalent to such deposit in the post office, and proof of mailing or of personal service must be filed with the clerk before the hearing of any such matter. If, upon the hearing it shall appear to the satisfaction of the court that the said notice has been regularly given, the court shall so find in its order of judgment, and such judgment shall be final and conclusive upon all persons.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1938), § 1761.**

### CHAPTER III.

#### POWER AND DUTIES OF GUARDIANS. (See page 123.)

§ 113. Inventory of ward's estate. Refusal of guardian to return inventory.

§ 114. Account of guardian.

**§ 113. Inventory of ward's estate. Refusal of guardian to return inventory.** Every guardian must return to the court a verified inventory of the estate of his ward within three months after his appointment. He must annually thereafter, and at such other times as directed by the court, render a verified account of the estate of his ward. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estates of decedents. Such inventory, with the appraisement of the property therein described, must be recorded



by the clerk of the court in a proper book kept in his office for that purpose and whenever any ward is or has been during the guardianship confined in a state hospital for the insane in this state a copy of said inventory must be served upon the secretary of the state commission in lunacy or its attorney. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof and the service of the same as are herein provided in relation to the first inventory and return. If within the time prescribed, or within such further time, not exceeding two months which the court or judge shall for reasonable cause allow, the guardian neglects or refuses to return the inventory or render his account, the court may, upon notice, revoke the letters of guardianship and the guardian shall be liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1943), § 1773.**

**§ 114. Account of guardian.** The guardian must upon the expiration of a year from the time of his appointment and as often thereafter as he may be required, present his account to the court for settlement and allowance; provided, that no account of the guardian of any insane person, who is or has been during such guardianship confined in a state hospital in this state, shall be settled or allowed unless notice of the settlement of said account shall have been first given to the secretary of the state commission in lunacy or its attorney at least five days before the hearing. The termination of the relation of guardian and ward by the death of either guardian or ward or by the ward attaining his majority or being restored to capacity shall not cause the court to lose jurisdiction of the proceeding for the purpose of settling the accounts of the guardian.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1943), § 1774.**



## CHAPTER IV.

## SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

(See page 134.)

§ 119. May sell in certain cases.

§ 139a. Proceedings for completion of contracts for sale of real estate by guardian.

§ 119. **May sell in certain cases.** When the income of an estate under guardianship is insufficient to maintain the ward and his family or to maintain and educate the ward when a minor, or to pay for his care, treatment and support, if confined in a state hospital for the insane, his guardian may sell his real or personal estate, or mortgage the real estate for that purpose, upon obtaining an order therefor; provided, that no such order shall be granted when the ward is or has been, during the guardianship, confined in a state hospital for the insane in this state unless notice of the proceedings shall have been given to the secretary of the state commission in lunacy or its attorney at least five days before the hearing.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1945), § 1777.**

§ 139a. **Proceedings for the completion of contracts for sale of real estate by guardians.** All proceedings for the completion of contracts for the sale of real estate by guardians must be had and made as required by the provisions of this title concerning the conveyance of real estate by executors and administrators under Secs. 1597 to 1607 inclusive, of this code, and said sections are hereby made applicable to conveyances by guardians as provided by Sec. 1810a.

[**Repealing clause.**] Sec. 2. All acts and parts of acts inconsistent with this act are hereby repealed.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1945), § 1789a.**

## CHAPTER V.

NONRESIDENT GUARDIAN AND WARDS. (See page 151.)



**CHAPTER VI.**

**GENERAL AND MISCELLANEOUS PROVISIONS.**

**§ 160a. Conveyance by guardian.**

**§ 160b. Attorneys' fees against minor fixed by court.**

**GUARDIAN AND WARD.**

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  - (1) Control of property.**
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- 5. Rights and powers of guardians.**
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- (8) Setting aside.
- (9) Collateral attack.
- 8. Lease and demise of ward's property.
- 9. Mortgage of ward's property.
  - (1) Petition as foundation of jurisdiction.
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- 10. Nonresident guardians and wards.
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  - (6) Proper charges against guardian. Interest.
  - (7) Credits allowable to guardian.
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  - (10) Conclusiveness. Attacking settlement.
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- 12. Collateral attack.
- 13. Jurisdiction of courts.
- 14. Jurisdiction of equity.
- 15. Liability of guardians.
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  - (3) Liability of guardian in general.
- 16. Embezzlement by guardian.
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- 18. Rights and liabilities of ward.
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  - (2) Actions by ward.
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  - (4) No disaffirmance of parol petition when.
- 19. Bond of guardian, and liability thereon.
  - (1) Failure to give a bond.
  - (2) Purpose of bond.
  - (3) Breach of bond.
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  - (5) Action on bond.
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  - (7) Defense to action.
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- 20. Limitations of actions.



**21. Appeal.**

- (1) In general.
- (2) Appealable orders.
- (3) Findings.
- (4) Effect of, as stay.
- (5) Record. Presumption.
- (6) Affirmance. Reversal.
- (7) Dismissal.

**22. Hawaii.****23. Disqualification of judge.**

**§ 160a. Conveyance by guardian.** When a person who is bound by contract in writing to convey any real estate, or to transfer any personal property, dies before making conveyance or transfer, and in all cases when such decedent, if living, might be compelled to make such conveyance or transfer, the court, having jurisdiction of the guardianship proceedings of such minor, may make a decree authorizing and directing the guardian of any minor, who has succeeded by distribution to the estate of such deceased person, to convey or transfer such real estate or personal property to the person entitled thereto.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1947), § 1810a.**

**§ 160b. Attorneys' fees against minor fixed by court.** All contracts for attorneys' fees made by or for the benefit of minors shall be void, and whenever a judgment shall be recovered by or on behalf of a minor, the attorneys' fees chargeable against said minor shall be fixed by the court in which said judgment is rendered, and if said judgment is for money, and there is no general guardian of said minor, one shall be appointed by the court, and the entire amount of the judgment shall be paid to and shall be cared for by such general guardian, under the control of the court.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1947), § 1810b.**

**GUARDIAN AND WARD.****1. APPOINTMENT OF GUARDIANS.**

(1) **Jurisdiction of court.** A probate court has general jurisdiction as to the care of the estates of minors and the



matter of appointing a guardian for a minor and authorizing the transfer of property through a guardian being within its jurisdiction, its decision in respect to them is binding and not open to collateral attack: *Brock v. Morris*, — Kan. —, 132 Pac. 1185.

In the appointment of guardians, the county (probate) courts are vested with a sound legal discretion and their judgments in such cases will not be overruled unless it is apparent that there has been an abuse of such discretion: *Brigman v. Cheney*, 27 Okla. 510, 112 Pac. 993.

It is not an abuse of discretion of the probate court to refuse an application to adopt a minor and grant one for guardianship when both applications are made by relatives of the minor and both applicants are equally well qualified to take charge of and care for it: *In re Wells*, 60 Wash. 518, 111 Pac. 779.

The county court in the state of Oklahoma by reason of Sec. 12, Art. 7, Const., has no jurisdiction in a probate proceeding by a guardian for an order of sale of the ward's real estate to hear and determine a claim of a third person to the real estate adverse to the ward: *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755.

The appointment of a curator by order of the probate court in what was Indian Territory for infant minors, pursuant to Mansf. Dig., Sec. 3477 (Ind. T. Ann. Stats. 1899, Sec. 2373), if made without voluntary appearance or due notice issued by said court to the mother of such minors, the father being dead, is void and such order may be set aside by said court on petition of the mother: *Wortham v. John*, 22 Okla. 562, 98 Pac. 347. (See page 164.)

**(2) Right to appointment.** Under Sec. 1751, Cal. Code of Civil Proc., it is the duty of the court to appoint the father or mother of a minor child under the age of 14 years as its guardian, if such parent is found by the court competent for the office; and inasmuch as the presumption of law is in favor of competency, the section is to be construed as if it read that the father or mother is to be appointed if not



found by the court incompetent: Guardianship of Forrester, 162 Cal. 493, 123 Pac. 283.

The right to appoint a guardian of a minor by will or deed is statutory, and under Sec. 241 of the Cal. Civil Code, a guardian of a legitimate child may be so appointed "by the father with the written consent of the mother, or by either parent if the other be dead or incapable of consent": Matter of Allen, 162 Cal. 625, 124 Pac. 237.

Parents are the natural guardians of their children, and can not be deprived of their right to their care, custody, society, and services, except by a proceeding in which it is shown that they are unfit or unwilling or unable to perform their parental duties: Matter of Hart, 21 Cal. App. 30, 130 Pac. 704.

Under the provisions of Sec. 5774, Rev. Codes of Idaho, either the father or mother of a minor being respectively competent to transact his or her own business and not otherwise unsuitable is entitled to the guardianship of the minor child: State v. Beslin, 19 Ida. 185, 112 Pac. 1053.

Under the provisions of Sec. 5774, Rev. Codes of Idaho, the surviving parent who is competent to transact his own business, and not unsuitable otherwise, is entitled to the guardianship of his minor children, and a finding that a father is a man of intemperate habits and lacking in integrity does not disentitle him to the guardianship of his minor child: In re Crocheran's Estate, 16 Ida. 441, 101 Pac. 741.

Under Code Civ. Proc., Sec. 1751, mother has primary right to be appointed in absence of proof that she is not fit to act: In re Guardianship of Snowball, 156 Cal. 240, 104 Pac. 444.

Forfeiture of the parent's right does not arise from mere temporary absence or neglect of parental duty: In re Guardianship of Snowball, 156 Cal. 240, 104 Pac. 444.

Parents can not be deprived of the right to the custody, society, and services of their children, except by proceedings in which it is shown that they are unfit, unwilling, or unable to perform their parental duties: Ex parte Hart, 21 Cal. App. 30, 130 Pac. 704.

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A judgment taking a young child from the custody of its aunt and giving it temporarily to its dissolute, immoral, and neglectful mother for the purpose of reforming her, is not countenanced by the law: *In re Lee*, 165 Cal. 279, 131 Pac. 749.

The parent of a minor has no property right in his or her offspring, and the privilege of the parent to have awarded to it the custody of the child is only a matter of right when the parent is found to be reasonably fitted to become such guardian: *Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018, 1019.

On a contest for letters of guardianship of a minor, when neither of the applicants has any preferential right to the appointment, the court is authorized, under section 246 of the Civil Code, to exercise its discretion in appointing one or the other of the contending parties, having due regard for the considerations set forth in that section: *Matter of Allen*, 162 Cal. 625, 124 Pac. 237.

Under section 1751 of the Code of Civil Procedure, it is the duty of the court to appoint the father or mother of a minor child under the age of fourteen years as its guardian, if such parent is found by the court competent to discharge the duties of guardianship; and inasmuch as the presumption of law is in favor of competency, the section is to be construed as if it read that the father or mother is to be appointed if not found by the court incompetent: *Matter of Forrester*, 162 Cal. 493, 123 Pac. 283.

Where the father is competent, he is entitled to letters of guardianship in preference to the grandmother, even though the court may find that the child's health and welfare would be promoted by granting guardianship to the grandmother: *Matter of Forrester*, 162 Cal. 493, 123 Pac. 283. (See page 164.)

**(3) Necessity of petition and notice.** Proceedings affecting infants and the appointment of guardians are special in their nature, and must be had in accordance with the procedure outlined by the code. The superior court, before



it is authorized to provide for a change in the temporary custody of the minor, must have had a proper motion presented to it and some evidence of the fact that the best interests of the child would be imperiled unless such order was made: *Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018, 1019.

To say that the best interests of a child shall be imperiled before the action indicated by section 1747 of the Code of Civil Procedure, providing for the temporary custody of such minor until a hearing can be had on the petition, can be taken, amounts to no more than to say that whenever it appears to be for the best interest of the minor such change of custody may be ordered: *Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018, 1019.

Where a motion to provide for a change in the temporary custody of a minor was presented to the court, and the action of the court in granting a change of custody can be sustained by any evidence whatsoever, which was presented to the trial court, however slight that evidence may be, the conclusion there reached will not be disturbed on appeal: *Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018, 1019.

Although section 1750 of the Code of Civil Procedure provides that a child under the age of fourteen must have his guardian appointed by the court, it does not follow that every child under that age is of "tender years" within the meaning of section 246 of the Civil Code. The sex is to be considered as is also the physical development. There can not be any fixed and certain age of minority, which, in all cases and for all purposes, can be said to constitute a child of "tender years": *Russell v. Russell*, 20 Cal. App. 457, 129 Pac. 467. (See page 165.)

**(4) Circumstances for consideration.** In a proceeding for the guardianship of the person of a minor, the determination from the evidence concerning the character of the petitioning father and other facts bearing on the condition and welfare of the child, as to whether or not he should have the guardianship, is a question largely in the discretion



of the court below. In the present case the evidence is deemed sufficient to support the conclusion of the lower court that the father was not a fit person to have the guardianship of the person of a female child of about six years of age: *Guardianship of Bedford*, 158 Cal. 145, 110 Pac. 302.

On an application by a mother to be appointed guardian of the persons and estates of her minor children, which is contested by their aunt on the ground that the mother is not a fit person to act as such guardian, a prior judgment denying an application of the aunt for guardianship of their persons, rendered in a proceeding instituted by her which was contested by the mother, in which her fitness was put in issue and determined in her favor is *res adjudicata* between the parties as to the mother's fitness to act as guardian of their persons, so far as her fitness might be affected by circumstances existing prior to the former hearing, but not by circumstances occurring subsequently: *Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444.

An order removing an infant from the temporary custody of its paternal grandfather, who had applied for final letters of guardianship thereof, and restoring its temporary custody to the mother, subject to restrictions, pending the final hearing of the application, that a nurse to whom its mother had committed the charge thereof be retained as such, who should take the child daily to the home of its grandparents, and that the mother should be forbidden to take the child out of the city where the court was held, was a proper order, subject to such restrictions; and there being sufficient evidence to support it, as made, it can not be annulled upon *certiorari* on petition of the paternal grandfather: *Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018.

When there was nothing to impeach the good faith of a guardian except the statement that he was a client of some of the attorneys in the proceedings that relation would not disqualify him from serving as guardian unless the retainer was in a matter relating to the subject in dispute: *Anderson v. McClellan*, 54 Or. 206, 102 Pac. 1016.



Determination from evidence of father's character and other facts bearing on condition and welfare of child whether he shall have guardianship of her person, is discretionary with trial court: *In re Bedford's Estate* (Cal.), 110 Pac. 302.

Proof of judgment of divorce against applicant on ground of desertion and awarding custody of child to mother, may be considered, as also may be prior consent of applicant to adoption of infant child by grandmother: *In re Bedford's Estate* (Cal.), 110 Pac. 302.

General statements by witnesses manifestly unfriendly, that child was always filthy and that mother did not keep clean house, are not sufficient to deprive her of guardianship: *In re Lindner's Estate*, 13 Cal. App. 208, 109 Pac. 101.

Denial of petition for letters of guardianship is *res adjudicata* as to question of fitness of applicant: *In re Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444. (See page 166.)

**(5) Bond. Estoppel.** (See page 167.)

**(6) Appointment here, notwithstanding foreign guardian.** (See page 168.)

#### REFERENCES.

Desire of aged person to marry as ground for appointment of guardian, see note 47 L. R. A. (N. S.) 475.

**(7) Validity of appointment.** Where the custody of a minor has been given to the father, an oral agreement entered into by him in California giving its custody to a third person is valid and binding on the mother, where the parents had separated by agreement: *In re Swall*, 36 Nev. 171, 134 Pac. 96.

A document which recited that a certain person had been appointed by the probate court of a territory as guardian of a minor, and which was signed by the probate judge, who, under the law is his own clerk, had attached thereto a certificate of the same probate judge, to which the seal of the court was attached certifying that the foregoing document was a true copy of the original letters of guardianship as shown by the record of his office. Held that it was in sub-



stantial compliance with the provisions of section 368 of the Civil Code of Kansas (Gen. Stats. 1909, Sec. 5963): *Bruck v. Morris*, 90 Kan. 64, 132 Pac. 1186.

An appointment of a guardian in another state may, for the purpose of securing an appointment of the same guardian in this state be proven by the duly authenticated copy of the original appointment, but it is not the exclusive method of proving that such appointment had been made. Other proof admissible under the general rules of evidence may be received for that purpose: *Bruck v. Morris*, 90 Kan. 64, 132 Pac. 1186.

An appointment of guardian of minors by a probate court must be made of record and the non-existence of such a record negatives any appointment: *Harrison v. Miller*, 87 Kan. 48, 123 Pac. 854.

An attempted appointment of another without the consent of the parent is invalid: *In re Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444.

Interest in property adverse to that of the ward does not necessarily disqualify one from being a personal guardian, where the guardianship of the estate is awarded to another: *In re Bedford's Estate* (Cal.), 110 Pac. 302. (See page 168.)

## 2. GUARDIANSHIP OF INDIANS.

(1) **In general.** The royalties and proceeds of an allotment of a member of the Cherokee tribe of Indians, shown by the enrollment record to be a minor, are, under the provisions of an Act of Congress of May 27, 1908, Ch. 199, 35 Stats. 312, subject to the jurisdiction of the county court in the exercise of its probate jurisdiction, notwithstanding the fact that by extrinsic evidence it may be shown that the said member had in fact attained his majority: *Cochran v. Teehee*, — Okla. —, 138 Pac. 563.

The guardian and mother of two Cherokee minor children made, under section 22 of an Act of Congress approved April 26, 1906 (34 U. S. Stats. at L., Ch. 1876, p. 145), application to the proper court for an order to sell to the proposed pur-



chaser of the mother's interest, the undivided interest of her minor children and wards in the lands, by filing in the court her petition, setting up the price offered and her contract to sell her interest to him, and introduced evidence to establish that the price offered was a fair market price. The court made an order directing the sale and directed the guardian to convey to the purchaser of her interest the interests of her wards and to execute therefor her deed as guardian and upon report thereof made by the guardian the sale was approved and was held to be a substantial compliance with said Sec. 22 *supra*: *Wilson v. Morton*, 29 Okla. 745, 119 Pac. 213.

Guardians' leases of allotments of Indian minors in the Five Civilized Tribes confirmed and approved by the trial court in that jurisdiction since April 26, 1906, are not subject to the approval or disapproval of the Secretary of the Interior, but the orders of the court confirming them are final: *Cowles v. Lee*, 35 Okla. 159, 128 Pac. 688.

The marriage of a minor male ward member of the Cherokee tribe of Indians of less than one-half Indian blood, does not of itself terminate his guardianship as to his allotment nor abate the jurisdiction of the county court, and a guardian under such jurisdiction has authority to make a sale of said minor's allotted lands: *Kirkpatrick v. Burgess*, 29 Okla. 121, 116 Pac. 764.

The United States court for the southern district of the Indian Territory had authority to appoint a guardian or curator of the estate of a minor located in that district although the domicile of the minor was in the central district and a guardian so appointed, when qualified, had authority to execute a valid lease of the minor's land: *Ma Harry v. Eatman*, 29 Okla. 46, 116 Pac. 935.

By reason of Secs. 1, 2, 6, Act of Congress May 27, 1908, Ch. 199, 35 Stats. 312, pt. 1, the restrictions on the alienation of the allotments of minor freedmen and minor Indians of the Creek tribe of Indians, having less than half Indian blood, are removed, and allotments of such allottees may be sold under the order and supervision of the probate courts



of the state of Oklahoma: *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755.

A minor Indian within the meaning of Secs. 1, 2, 6, Act May 27, 1908, Ch. 199, 35 Stats. 312, pt. 1, includes males under the age of twenty-one years and females under the age of eighteen years, and the marriage of such a minor does not confer upon him or her authority to sell his or her allotted lands independent of the jurisdiction and supervision of the probate courts: *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755.

A guardianship proceeding pending in one of the United States courts of the Indian Territory at the time of admission of the state was by section 19 of the enabling act (Act June 16, 1906, Ch. 33, 35 Stats. 277) and section 23 of the schedule of the constitution, transferred to the county court of the county in which was located the court in which the case was pending: *Eaves v. Mullens*, 25 Okla. 679, 107 Pac. 433.

A contract entered into subsequent to the passage of the Curtis bill (Act of Congress June 28, 1898, Ch. 517, 30 Stats. 495) and prior to the Creek Treaty of 1901 (Act of Congress March 1, 1901, Ch. 676, 31 Stats. 861) purporting to bind certain infants for the purchase price of improvements upon lands in the Creek nation taken by them as allotments, executed by their natural guardian, who did not submit himself or his actions to a court having jurisdiction, is void as to such infants: *Beck v. Jackson*, 23 Okla. 812, 101 Pac. 1109. (See page 169.)

### 3. CONTROL OF PROPERTY, SUPPORT, MAINTENANCE, AND CUSTODY OF WARD.

(1) **Control of property.** A general guardian of the estate of a minor is entitled to the exclusive possession, together with the care and management of the estate of such minor committed to his trust, which can not be limited by order of court as to its custody, and where, on annual settlement, the court found the amount due such minor and ordered the same paid by said guardian to the clerk of the



court, that part of the order to make such payment is void: *In re Bolin's Estate*, 22 Okla. 851, 98 Pac. 934.

It was the duty of the guardian, as trustee of the investment fund, to retain absolute control thereof, and to withdraw the money from the bank upon the slightest indication of danger or loss. He can not perform his duty promptly if he is clogged by the necessity of procuring the concurrent action of other persons: *Estate of Wood*, 159 Cal. 466, 114 Pac. 992.

Where there was a relinquishment of control over the permanent investment by the guardian by leaving the bank book in the control of a surety company which was the sole surety on the guardian's bond, so that the guardian could make no draft upon the fund without its consent, the guardian thereby became a guarantor of the fund, irrespective of his motive or of whether his surrender of control was the cause of the loss of the fund. Where the loss occurred through failure of the bank, the court will not inquire, in determining the liability of the guardian, whether such loss was due to his abdication of control of the investment: *Estate of Wood*, 159 Cal. 466, 114 Pac. 992.

It is held that if it be desired to provide some method by which a surety company may have some control of a trust fund as to which it has merely become surety for an officer of the court, such as a guardian or administrator, to whom the court has given such fund in charge, the method must be provided by the legislative department of the government; for the law, as it now stands in this state, does not authorize it: *Estate of Wood*, 159 Cal. 466, 114 Pac. 992. (See page 170.)

**(2) Support and maintenance.** Guardian can not subject interest in ward's estate to latter's maintenance without leave of court: *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640.

In view of the provision of section 208 of the Civil Code, that a "parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without



an agreement for compensation," the acquiescence of a father in the voluntary support of his child by its grandparents can not be construed as a willful failure by him to support it, within the meaning of subdivision 4 of section 246 of the Civil Code: *Matter of Forrester*, 162 Cal. 493, 123 Pac. 283.

Orders made by the guardianship court, from time to time, for the withdrawal of funds from the possession of the administrator for the support of the wards do not indicate any knowledge on the part of the court that the guardian had made any permanent deposit of the funds, nor imply any ratification of the same or of the mode of the control thereof: *Estate of Wood*, 159 Cal. 466, 114 Pac. 992. (See page 170.)

(3) **Contract for support.** (See page 171.)

(4) **Support of abandoned child.** (See page 172.)

(5) **Custody of ward. Access.** (See page 172.)

#### 4. DUTIES AND POWERS OF GUARDIANS.

(1) **In general.** A guardian's deed made without any order or authority from any court is a nullity: *Palmer v. Abrahams*, 55 Wash. 352, 104 Pac. 649. (See page 172.)

(2) **Powers of guardian as to contracts.** (See page 173.)

(3) **Power of guardian to assign appropriation made for ward by probate court.** (See page 174.)

#### REFERENCES.

Right of guardian to surrender policy in favor of ward, see note 35 L. R. A. (N. S.) 1123.

#### 5. RIGHTS AND POWERS OF GUARDIANS.

(1) **Guardian may do what.** Where a guardian purchased his ward's property for its full value and in due time accounted fully and fairly for the purchase money it was not a wrongful act for him to use the ward's money to make payments on account of the price when he himself person-



ally was quite responsible for the amount and had given ample security therefor: *Smith v. Smith*, 45 Mont. 535, 125 Pac. 1002. (See page 174.)

#### REFERENCES.

As to right of guardian to compromise infant's cause of action for personal injuries, see note 21 L. R. A. (N. S.) 338.

Power of guardian to redeem legacy, see note 28 L. R. A. (N. S.) 401.

Power of court of guardian of incompetent or habitual drunkard to consent to conveyance by trustee under a trust requiring consent by the cestui que trust, see note 39 L. R. A. (N. S.) 39.

(2) **Guardian can not do what.** Where the husband was appointed as guardian of the minor children by the probate court, he had no power to bind their interests by contract or by mechanics' liens without an order of the court: *County of Los Angeles v. Winans*, 13 Cal. App. 234, 109 Pac. 641. (See page 175.)

(3) **Actions by guardian.** Mother is not empowered to sue for her children where her husband is regularly appointed guardian: *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640. (See page 177.)

(4) **Actions against guardians.** Under section 5641, Comp. Laws of Oklahoma 1909, requiring a guardian who defends for a minor to put in issue all the material allegations of the petition, and section 5649, providing that it is unnecessary for such a guardian to verify his answer in order to put in issue the execution of written instruments and endorsements thereon, a general denial filed by such guardian puts in issue every material allegation of a petition, including allegations of the execution of written instruments and other allegations which an adult must deny under oath: *Sims v. Hedges*, 32 Okla. 683, 123 Pac. 155.

A separate suit will lie on behalf of each of several wards where each has severable claim against guardian's estate and where guardian converts ward's money and so mingles same as to prevent tracing, though wards present claim as



“joint claimants”: *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. (See page 177.)

## 6. INVESTMENT BY GUARDIAN.

The measure of care and skill required of a guardian in the investment of his ward's funds is such as would be exercised by a man of ordinary prudence and skill in the management of his own business: *Estate of Wood*, 159 Cal. 466, 114 Pac. 992.

The necessity of temporarily depositing trust funds in a bank for safe keeping is recognized, and if a trustee, for the purposes of such temporary deposit, exercises the degree of care and skill stated in the selection of a bank, and so earmarks the deposit as to show its trust character, he is not responsible for the failure of the bank; but if he deposits the money in his individual real name, without any designation or indication of his representative character, he is generally liable in the event of loss through the failure of the bank, notwithstanding he has not been guilty of any negligence: *Estate of Wood*, 159 Cal. 466, 114 Pac. 992. (See page 178.)

## 7. SALES OF LAND.

(1) **In general.** A county court in Oklahoma having acquired jurisdiction of the person and estate of a minor, may order the sale of the land of said minor situate in another county and may also confirm the sale and order a guardian's deed to be made accordingly: *Dewalt v. Cline*, 35 Okla. 197, 128 Pac. 121.

A probate court is powerless to divest minors of their title to real estate, except through a guardian duly appointed and in accordance with the statute: *Harrison v. Miller*, 87 Kan. 48, 123 Pac. 854. (See page 180.)

(2) **Petition for.** A petition of a guardian for an order of sale of his ward's real estate must be filed in the county court of the county in which he was appointed guardian; but the petition is not required to show affirmatively that



the ward resides in the county where it is filed, in order to give the court jurisdiction: *Eaves v. Mullen*, 25 Okla. 679, 107 Pac. 433. (See page 181.)

**(3) Notice. Publication.** There is no requirement of statute in the state of Oklahoma that notice shall be given by a guardian of his intended application for an order of sale of his ward's real estate: *Spade v. Martin*, 28 Okla. 384, 114 Pac. 724. (See page 183.)

**(4) Additional bond.** (See page 184.)

**(5) Order for.** Under Gen. Stats. 1909, Sec. 4829, providing that a guardian can sell his ward's real estate only upon the order of the probate court, a guardian's contract for the conveyance of his ward's land has no legal standing until approved by the probate court: *Nichols v. Bryden*, 86 Kan. 941, 122 Pac. 1119. (See page 184.)

**(6) Validity of.** A guardian's sale of her infant wards' interest in real estate may be specifically enforced at the suit of the infants brought by them through their guardian and next friend, the title of the purchaser will be good, and by virtue of the decree of specific performance all doubt respecting the marketability of the title will be removed: *Grey v. Hanson*, 86 Kan. 933, 122 Pac. 879. (See page 186.)

**(7) Purchaser and his rights.** An appeal may be taken by the purchaser at a guardian's sale from the county court to the district court from an order refusing to confirm the sale, under section 1793, Wilson's Rev. and Ann. Stats. 1903 (Sec. 5451, Comp. Laws 1909 of the state of Oklahoma): *In re Billy*, 34 Okla. 120, 124 Pac. 608. (See page 188.)

**(8) Setting aside.** Under section 5323 Comp. Laws of Oklahoma 1909, where upon a hearing on return of sale, an advance bid of 10 per cent is made to the court in writing by a responsible person, the court is not limited to the alternative of accepting the first offer that may be made, or ordering a new sale, but should receive as many bids as may be made, and upon a consideration of all the bids, determine whether to accept the highest bid submitted by a responsible



bidder or order a new sale: *In re Bohanan*, 37 Okla. 560, 133 Pac. 189. (See page 189.)

(9) **Collateral attack.** Where a petition in a suit to quiet title to certain land alleges that an order of court directing a guardian to sell the land was procured by fraud and prays to have the order of sale and subsequent orders approving the sale cancelled, the suit is a direct attack and not a collateral attack: *Brown v. Trent*, 36 Okla. 239, 128 Pac. 895. (See page 191.)

## 8. LEASE AND DEMISE OF WARD'S PROPERTY.

While at common law all leases by a guardian to extend beyond the term of the guardianship were voidable, a lease of a minor's land pursuant to an order of the probate court was valid, though it extended beyond minority: *Cowles v. Lee*, — Okla. —, 128 Pac. 688.

While at common law all leases by a guardian to extend beyond the term of the guardianship were voidable, a lease of a minor's land pursuant to an order of the probate court is valid though it extends beyond minority: *Hustin v. Cobleigh*, 29 Okla. 793, 119 Pac. 416.

A lease of oil and gas mining privileges made by the guardian of a minor, permission of the court having first been obtained and such lease having been approved and confirmed by the court, though without the preliminary notices essential for the order of sale and confirmation of the same in case of the sale of real estate of minors by guardians, is valid against a collateral attack: *Duff v. Keaton*, 33 Okla. 92, 124 Pac. 291.

A lease executed by a natural guardian who has not submitted himself or his actions to a court having jurisdiction, nor executed a bond, nor procured an order to lease, is void as to such infant, at his or the option of those who legally represent him: *Capps v. Hensley*, 23 Okla. 311, 100 Pac. 575.

An allotment of an infant, without a legal guardian, living with his father, who is his natural guardian, having been leased by said natural guardian at the rate of 25 cents per



acre per year for a period of five years, and for improvements to be made thereon, to consist of breaking land, building fences and houses benefiting such estate, such contract having been entered into in good faith by all parties thereto, believing it to be a substantially fair contract, and authorized under the law, said father, having afterward been appointed as legal guardian, repudiating said contract, the value of such improvements will be allowed out of the rents in an accounting: *Muskogee Development Co. v. Green*, 22 Okla. 237, 97 Pac. 619. (See page 193.)

### 9. MORTGAGE OF WARD'S PROPERTY.

(1) **Petition as foundation of jurisdiction.** (See page 194.)

(2) **Authority to mortgage.** In Kansas the probate court has jurisdiction to authorize a guardian to execute a mortgage upon real estate owned by several wards giving a lien upon all the property for the whole debt secured: *First Nat. Bank of Winfield v. Bangs*, — Kan. —, 136 Pac. 916.

Under a decree of divorce community property consisting of a house and lot was set aside for the use, support, maintenance, and education of the minor children. The mother was awarded the custody of the children and afterward was appointed their guardian. There was a mortgage on the property. The court granted the guardian permission to borrow more money on the property to pay off the original mortgage and provide further funds for the maintenance and education of the children. Held that this was proper and within the purposes of the trust created by the decree of divorce: *Schmitt v. Joranson*, — Nev. —, 140 Pac. 519. (See page 194.)

(3) **Validity of order and mortgage.** (See page 196.)

(4) **Revival and foreclosure of former mortgage.** (See page 196.)



## 10. NONRESIDENT GUARDIANS AND WARDS.

In the absence of evidence it will be presumed that the statutory provisions of a foreign state regulating the rights of guardian and ward are the same as those of the former: *Nichols v. Bryden*, 86 Kan. 941, 122 Pac. 1119.

## 11. ACCOUNTING AND SETTLEMENT.

(1) **In general.** After wards have become of age for some time it is to be presumed that the guardian has made an accounting which has been approved by the court: *First Nat. Bank of Winfield v. Bangs*, — Kan. —, 136 Pac. 917.

The arrival of a ward at majority terminates the guardianship, except for the purposes of accounting and settlement with the ward: *Rullman v. Rullman*, 81 Kan. 521, 106 Pac. 52.

A guardian should present his final account for settlement upon the ward attaining majority: *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600.

If the guardian dies after the ward attains his majority without having presented it, his personal representative can not, in the absence of statute, make presentation in his stead: *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. (See page 198.)

(2) **Duty to account.** It is within the province of the court to require guardians to settle the accounts of their wards, even after the letters of guardianship have been revoked: *Title Guaranty & Trust Co. v. Hinkel*, 35 Okla. 128, 128 Pac. 696. (See page 199.)

(3) **Jurisdiction of courts.** (See page 200.)

(4) **Exceptions to account.** (See page 201.)

(5) **Admissibility of evidence.** (See page 202.)

(6) **Proper charges against guardian.** (See page 203.)

(7) **Credits allowable to guardian.** A guardian should be allowed all necessary expenses in caring for the ward's



person and estate, but the judgment of the lower court should be followed unless it appears that the same is contrary to the preponderance of the evidence and not made with due consideration of all the pertinent facts: *In re Bayer*, — Wash. —, 141 Pac. 684. (See page 204.)

**(8) What is not to be allowed. Compensation.** Mere mistakes in keeping accounts with the estate, where no fraud is shown, do not forfeit a guardian's right to compensation for his services: *Rogers v. Lindsay*, 89 Kan. 180, 417, 131 Pac. 150.

The law provides that a guardian is to have such compensation for his services as the court in which his accounts are settled deems just and reasonable; but of course a faithful stewardship is contemplated and while a mere technical breach of duty which does not result in injury to the ward's estate will not ordinarily justify a court in withholding compensation altogether, a flagrant violation of the duties of the trust will do so: *In re Allard*, — Mont. —, 141 Pac. 664.

In the settlement of accounts between guardian and ward where the guardian was the ward's stepfather and previous to his appointment as guardian had paid for the care and support of his stepchild out of his own means without any expectation of ever being reimbursed, none of such expenses should be allowed, but only expenses incurred after he was appointed legal guardian: *In re Harris*, — Ariz. —, 140 Pac. 828. (See page 205.)

**(9) Death of ward before settlement.** Where an order is made by the county court confirming a guardian's sale of real estate, and on appeal to the district court the judgment of the county court is sustained and an appeal is then taken to the supreme court and the judgment below superseded, and where pending the appeal the ward dies, the proceedings can not longer be sustained and should be dismissed: *In re Bohanan*, 37 Okla. 560, 133 Pac. 45. (See page 207.)

**(10) Conclusiveness. Attacking settlement.** Where an order of settlement and discharge of a guardian was made without notice to or knowledge of the wards and the guard-  
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ian's accounts had neither been settled by the court nor between the guardian and his wards and the guardian continued to hold himself out as guardian, the settlement and discharge were therefore *ex parte* and determined nothing as between the guardian and his wards: *Sroufe v. Sroufe*, 74 Wash. 639, 134 Pac. 473.

A guardian will not be permitted to testify in a manner to impeach the final settlement of his guardianship accounts, regularly made by the court: *Title Guaranty & Trust Co. v. Slinker*, 35 Okla. 128, 128 Pac. 696.

The periodical or partial settlements of guardians are, at most, after approval by the court, but *prima facie* evidence of their correctness and may be rectified or rebutted on a final accounting. They are not settlements but only the exhibition of accounts, nor judgments, being merely *ex parte* presentations of the status of the estate in the hands of the guardian: *American Bonding Co. v. People*, 46 Colo. 460, 104 Pac. 83.

The term "final accounting" or "final settlement" implies an accounting or settlement after the severance of the relationship between guardian and ward and unless an event has transpired which causes such severance, a settlement can not be final. The reason of the rule is that the liability of the guardian extends beyond the time of the settlement: *American Bonding Co. v. People*, 46 Colo. 460, 104 Pac. 83.

A settlement made under Secs. 2084, 2093, and 4728 Mills Ann. Stats. of Colorado is a final account regularly made and constitutes a judgment conclusive between the ward on one side and the guardian and surety on the other unless impeached in the court in which it was rendered by proof of fraud or such other defects as would invalidate judgments of other courts: *American Bonding Co. v. People*, 46 Colo. 460, 104 Pac. 83. (See page 207.)

(11) **Discharge of guardian.** A regular appointment of a guardian gives the court jurisdiction over the person and estate of the ward and such jurisdiction continues until the ward attains his majority, when the right of the court or



guardian to manage the estate and the person of the ward ceases: Section 6401, Ballinger's Ann. Codes and Stats. (Pierce's Code, Sec. 2735). If a ward has attained majority when the final account of a guardian is filed, no guardian ad litem is necessary or proper. His personal appearance is sufficient to give the court jurisdiction and where the ward appears on the application for discharge and the hearing on the guardian's final report and it then appearing to the court that the ward had arrived at full age the court had jurisdiction to enter an order of final discharge and cast the burden thereafter upon the ward to manage his own estate. If, therefore, in another proceeding it should be subsequently shown to the court that its finding as to the arrival of the ward at full age was erroneous such finding is not void but voidable only and is binding on the ward and those in privity with him until vacated or set aside for fraud or for error: *Meeker v. Mettler*, 50 Wash. 473, 97 Pac. 508. (See page 208.)

12. COLLATERAL ATTACK. (See page 209.)

13. JURISDICTION OF COURTS. (See page 210.)

14. JURISDICTION OF EQUITY.

A guardian can not apply to a court of equity for leave to sell property of the ward but must make the application to the court from which he received his appointment of guardian: *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640. (See page 212.)

15. LIABILITY OF GUARDIANS.

(1) **For investments made without order of court.** In an action by a mother to foreclose a mortgage for \$3000 taken by her to secure a loan made by her of \$2400 of her minor daughter's money, as natural guardian without appointment as legal guardian, it appearing that the mother subsequently pledged the note for the daughter's money and the mortgage to secure a private loan to her of \$1500 by the intervenor, the court properly found and adjudged that since the result of a prior suit by the intervenor to foreclose the mortgage,



to which his right was limited, the daughter had acquired both the note of \$2400 of her money and the \$3000 note and mortgage to secure the same, and that she was entitled to foreclose the mortgage, and that the intervenor was entitled to be paid the sum of \$1500 with interest out of the proceeds of sale, and that the remainder of the proceeds should be paid to the daughter: *Stull v. Benedict*, 10 Cal. App. 619, 102 Pac. 961.

A loan by a guardian of the ward's money without strict compliance with the statutory requirements as to such loan is at the guardian's peril: *American Bonding Co. v. People*, 46 Colo. 460, 104 Pac. 84.

Changing form of investment held to require leave: *Code Civ. Proc.*, Secs. 1768, 1770, 1772; *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640.

In the absence of an order of court permitting it, a deposit by the guardian of the funds of his ward in a bank for permanent investment is, in effect, a loan to the bank on personal security only, which is not a proper exercise of due care. In such case, the guardian is liable to make good the loss of such permanent investment as the result of the failure of the bank: *Estate of Wood*, 159 Cal. 466, 114 Pac. 992. (See page 214.)

(2) **Protection of order of court.** A private sale of the land of a minor by his guardian for investment, made under order of court and confirmed by the court if irregular is not void on collateral attack: *Spade v. Morton*, 28 Okla. 384, 114 Pac. 724.

Rendering property subject to mechanic's lien held to require leave of court: *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640.

Binding property by contract held to require leave, and attempt will give party with whom he contracts no lien for labor or materials: *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640.



The only action of the guardianship court which will protect a guardian in the matter of the investment of the funds of the ward must be action had under such circumstances as show a bringing of such matter by the guardian to the attention of the court for an adjudication thereon: *Estate of Wood*, 159 Cal. 466, 114 Pac. 992. (See page 215.)

(3) **Liability of guardian in general.** When a guardian in good faith and under the order of the probate court deposits funds belonging to his ward in a bank outside the territory of Alaska and such fund is lost by the failure of the bank during a financial stringency, the guardian is not liable for the loss: *In re Guardianship of Corcoran*, 3 Alaska 263. (See page 215.)

#### REFERENCES.

Guardian carrying on business of ward, see note 40 L. R. A. (N. S.) 205.

Personal liability of a guardian for losses to ward's estate from investments, see note 44 L. R. A. (N. S.) 873.

### 16. EMBEZZLEMENT BY GUARDIAN.

Where a guardian of two minor wards converts to his own use a fund a respective half of which belonged to each of the wards in severalty, each of them acquires a separate claim against the guardian for his portion of the fund so converted: *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600.

Where the evidence shows that the wards had received more than the amount due them from the estate it was held that a charge against the guardian and others of conspiracy to defraud was not maintained: *Smith v. Kent Lumber Co*, — Wash. —, 138 Pac. 879.

An action may be maintained in the district court against the administrator of a guardian who converted his wards' money, became insolvent and died, and against the sureties on the guardian's bond, without a previous settlement of the guardian's accounts in the probate court: *Mitchell v. Kelly*, 82 Kan. 1, 107 Pac. 782, 136 Am. St. 97.



Where guardian was appointed when wards were only twelve and fourteen years of age, year after received \$4000 for wards, which he never accounted for, and suit was instituted over forty-four years after, shortly after discovery of conversion, it was held that the lapse of time was no defense to the action: *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. (See page 217.)

### 17. REMOVAL OF GUARDIAN.

A guardian is not a "public officer" within Gen. Stats. 1009, Sec. 3624, subd. 9 of Oklahoma, providing that quo warranto may be brought in the supreme court when any person shall unlawfully hold any public office; and hence the supreme court has no jurisdiction to entertain an action in quo warranto to oust a guardian: *Linderholm v. Ekblad*, — Kan. —, 139 Pac. 1015.

### 18. RIGHTS AND LIABILITIES OF WARD.

(1) **In general.** (See page 218.)

(2) **Actions by ward.** An action for a balance claimed to be due from a guardian to his ward at the time the latter reached the age of majority is not an action for relief on the ground of fraud: *Hawk v. United States Fidelity and Guaranty Co.*, 83 Kan. 775, 112 Pac. 602.

Where a corporation leases a minor's land from her guardian for oil and gas purposes paying therefor to the guardian for the use of his ward, \$40 an acre bonus and an eighth royalty, and at the same time and as a part of the same consideration, pays to the guardian for his own use and benefit, \$20 an acre for the improvements on the land, claimed by the guardian to be his property, when in fact such improvements were purchased with the money belonging to the ward, the ward may maintain an action against such corporation for a cancellation of the lease. But where such action is commenced by the ward after majority, and she sets out in her petition all of the facts relative to the fraudulent transaction between the corporation and her guardian, and verifies the same, and when such ward is a



person of ordinary intelligence, if thereafter she voluntarily makes final settlement with her guardian, receiving from him valuable property and money, knowing said property and money to be the proceeds of such lease, such settlement is a ratification of the lease: *Lasoya Oil Co. v. Zulkey*, — Okla. —, 140 Pac. 160. (See page 218.)

(3) **Actions against ward.** Where a firm of attorneys is employed by the acting guardian of the estate of minor heirs to perform legal services and such employment is ordered and sanctioned by the probate court and it appears that such services were necessary and beneficial to the estate, and that the charges therefor were reasonable and just and where the judgment for the amount claimed is sufficiently supported by the evidence, such judgment will not be disturbed: *Parnell v. Washington*, — Okla. —, 139 Pac. 121. (See page 220.)

(4) **No disaffirmance of parol petition when.** (See page 221.)

## 19. BOND OF GUARDIAN AND LIABILITY THEREON.

(1) **Failure to give a bond.** (See page 221.)

(2) **Purpose of bond.** The general bond required of a guardian is intended to secure to the infant the proper accounting for all funds, from whatever source they may be derived, that may come into the hands of the guardian; the special or "sales" bond required by statute is cumulative security required and given for the benefit of the ward, and a failure on the part of the guardian to account for the proceeds of a sale of real estate will not excuse or absolve his sureties on his original or general guardian's bond: *Southern Surety Co. v. Burney*, 34 Okla. 552, 126 Pac. 748. (See page 222.)

(3) **Breach of bond.** (See page 222.)

(4) **New bond.** (See page 222.)

Where a guardian's bond runs to several wards jointly they are not all necessary parties plaintiff, the bond being to protect the individual rights of each ward and the de-



termination of the controversy will not prejudice the rights of the other wards, but if necessary the court may order them to be brought in: *U.-S. Fidelity & Guarantee Co. v. Parker*, 20 Wyo. 29, 121 Pac. 536. (See page 222.)

**(5) Action on bond.** A minor by his legal guardian may maintain an action on the official bond of a former guardian, although the bond, which was executed prior to statehood, was made payable to the United States of America: *Title Guaranty & Surety Co. v. Slinker*, 35 Okla. 128, 128 Pac. 696. (See page 222.)

**(6) Liability of sureties.** Where a guardian, besides the bond given when he was appointed, gave two other bonds conditioned the same as the first, as additional security for the performance of his duties as guardian, all of the sureties upon the several bonds could be joined in one suit, to recover the amount due from the guardian to his successor upon his removal as guardian: *People's Bank & Trust Co. v. Nelson*, 37 Okla. 500, 132 Pac. 493.

Under the law in force in the Indian Territory prior to statehood, sureties on a guardian's bond were liable for moneys misappropriated by him as such guardian whether before or after the execution of such bond: *People's Bank & Trust Co. v. Nelson*, 37 Okla. 500, 132 Pac. 493.

Sureties on a guardian's bond are, in the absence of fraud, concluded by the decree of the court, duly entered in a hearing on an accounting, or final settlement, as to the amount of the principal's liability, although the sureties are not parties to the accounting: *Title Guaranty & Surety Co. v. Slinker*, 35 Okla. 128, 128 Pac. 696; see also *Southern Surety Co. v. Burney*, 34 Okla. 552, 126 Pac. 748.

Where a surety bond is executed upon a consideration of a company organized to make such bonds for profit the company does not stand in the position of a surety for accommodation: *United States Fidelity & Guarantee Co. v. Parker*, 20 Wyo. 29, 121 Pac. 536.



A guardian who had been appointed by a district court in Montana died in another county of that state and an administratrix of his estate was appointed by the district court of the latter county. One of the wards presented a claim to the administratrix for a divestment by the guardian. The claim was rejected, suit brought, and judgment rendered against the administratrix. Held in an action against the surety on the guardian's bond that a settlement of the guardian's accounts in the court of his appointment was not a condition precedent to the right to recover on the bond: *United States Fidelity & Guarantee Co. v. Parker*, 20 Wyo. 29, 121 Pac. 534; *Same v. Nash*, 20 Wyo. 65, 121 Pac. 542.

Under a guardian's bond which runs to several wards jointly the aggregate liability can not exceed the amount of the penalty whether recovery is had jointly or severally: *United States Fidelity & Guaranty Co. v. Parker*, 20 Wyo. 29, 121 Pac. 536; *Same v. Nash*, 20 Wyo. 65, 121 Pac. 544.

A guardian appointed to succeed a widowed mother who had been guardian of her minor children and had filed a report and afterward appropriated her wards' estate, brought suit against the surety on the mother's guardianship bond. In her report the mother guardian had not made any charge for the support of the minor children. Held that the surety was precluded by the report from setting off an amount for such support in reduction of his liability on the bond: *In re Mackall*, 60 Wash. 655, 111 Pac. 885.

It is a general principle that sureties on a guardian's bond are liable only for the money or property that actually was or came into the hands of the guardian during the term covered by the bond on which they were sureties, and that penal bonds are never held to be retrospective in their operation unless plainly so intended and expressed: *American Bonding Co. v. People*, 46 Colo. 394, 104 Pac. 83. (See page 224.)

#### REFERENCES.

Liability of sureties on guardian's bond for defalcation prior to the execution thereof, see note 39 L. R. A. (N. S.) 961.

Liability of sureties on general bond of guardian, as affected by a special bond, see note 43 L. R. A. (N. S.) 308.



(7) **Defense to action.** (See page 225.)

(8) **Limitations of actions.** (See page 225.)

## 20. LIMITATIONS OF ACTIONS.

Action to set aside a void sale by a guardian where the purchaser has taken and retains possession must be brought within five years after the recording of the guardian's deed or within two years after removal of plaintiff's disability, under Comp. Laws of Okla. 1909, Secs. 5547-5549: *Dodson v. Middleton*, 38 Okla. 763, 135 Pac. 369.

In an action in the nature of an accounting brought against the representative of a deceased guardian by the ward more than six years after the final settlement of the guardian in the probate court and the attainment of the majority of the ward and where it appears from the evidence that the mistake or constructive fraud could have been discovered at the time of the settlement, the finding of the court that the ward has been guilty of laches and can not maintain the action will not be disturbed: *Rogers v. Lindsay*, 89 Kan. 180, 131 Pac. 611.

The five year limitation prescribed under heading "Second," section 5608 of the Gen. Stats. of 1909, Kansas (Code of Civil Proc., Sec. 15) does not apply in an action for the recovery of land which was sold by one as guardian who had not been so appointed: *Harrison v. Miller*, 87 Kan. 48, 123 Pac. 854.

A cause of action against a guardian for a balance of money due to his ward at the time the latter reached the age of majority accrues at that time, and is a liability created by statute, to which the three year period of limitation prescribed by the statute applies: *Hawk v. United States Fidelity & Guaranty Co.*, 83 Kan. 775, 112 Pac. 602. (See page 226.)

## 21. APPEAL.

(1) **In general.** An appeal from a judgment against a guardian in an action prosecuted by him in his own name



as guardian, must be commenced within one year after the rendition of the judgment, and all necessary parties to the proceeding must be brought into the appellate proceedings, either by summons in error or by entry of general appearance, within that period, or the appeal will be dismissed: *John v. Paullin*, 24 Okla. 636, 104 Pac. 365.

An appeal from an order appointing a guardian can not be taken before the order is entered: *In re Dunphy's Estate*, 158 Cal. 1, 109 Pac. 627. (See page 227.)

**(2) Appealable orders.** (See page 227.)

**(3) Findings.** Upon a petition to revoke letters of guardianship of an incompetent person, and to appoint petitioner as guardian, where the order for the citation to issue is in the record, but not the citation itself, though the record recites that citation was issued pursuant to the order, and the guardian came in and answered fully, she has no cause to complain upon appeal that the citation had no sufficient statement of the proceeding to enable her to answer the petition: *Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594. (See page 228.)

**(4) Effect of, as stay.** The power of one appointed guardian of the person and estate of an incompetent person is stayed pending an appeal from the order of appointment, by the filing of the undertaking on appeal provided for by section 941 of the Code of Civil Procedure. If the guardian, notwithstanding such appeal, threatens to take possession of the property of the incompetent and to act as his guardian pending the appeal, a writ of supersedeas will be issued against him: *Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26. (See page 228.)

**(5) Record. Presumption.** (See page 229.)

**(6) Affirmance. Reversal.** In an action by a mother for an accounting of guardianship of her estate by her son, the value of which was determined, in which the son set up a counter claim for board and lodging of the mother which the trial court disallowed, where the only question upon



appeal from the judgment relates to the disallowance of such counter claim, and the record upon appeal shows no agreement or understanding that such board and lodging was to be paid for, the only question is whether such promise could be implied; and where the circumstances are such as to warrant the trial court in inferring as a fact that no promise was implied, the judgment must be affirmed: *Crane v. Derrick*, 157 Cal. 667, 109 Pac. 31.

Upon appeal by a mother after the death of the father, from an order refusing her petition for appointment as guardian of the person and estate of her young child three years of age, upon a finding of her unfitness to have the care and custody of the child, where the evidence fails to sustain such finding, the judgment and order denying her petition must be reversed: *Estate of Lindner*, 13 Cal. App. 208, 109 Pac. 492.

Section 966 of the Code of Civil Procedure, providing that "when the judgment or order appointing an executor or administrator, or guardian is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed," does not give the guardian the right to act as such during the pendency of the appeal: *Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26. (See page 229.)

(7) **Dismissal.** (See page 229.)

## 22. HAWAII.

There being no statute in the territory of Hawaii providing for or controlling the appointment of guardians ad litem the courts of that territory proceed upon their inherent authority, and the appointment of a guardian ad litem of minor defendants need not be made by a formal order. Any action on the part of the court whereby a person assuming to act as a guardian ad litem is recognized as such is equivalent to an appointment: *Lakua v. Manaia*, 21 Haw. 160.



A guardian's promise to pay ward's debts incurred prior to his appointment, being without consideration, is not actionable: *Kane v. Madeiros*, 19 Haw. 564.

### 23. DISQUALIFICATION OF JUDGE.

A judge is disqualified to sit in guardianship proceedings where the guardian is his brother-in-law, the guardian being "a party" within the meaning of Oklahoma Comp. Laws 1909, Sec. 2012, which provides that "No judge of any court of record shall sit in any cause or proceeding in which he may be related to any party to said cause, within the fourth degree of consanguinity or affinity": *Hengst v. Burnett*, — Okla. —, 135 Pac. 1063.



## CHAPTER VII.

## GUARDIANSHIP OF INSANE PERSONS AND OTHER INCOMPETENTS.

§ 161. Notice of time and place of hearing.

§ 162. Certificate of inability to attend.

§ 168. Powers and duties of guardians.

1. Sanity and disability.
2. Jurisdiction of probate courts.
3. Appointment of general guardian.
  - (1) Petition for. Authority of court.
  - (2) Notice and personal presence.
  - (3) Validity of notice.
  - (4) Notice by publication.
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4. Guardian ad litem.
5. Support, maintenance, and custody.
6. Powers, duties, and liabilities of guardians.
  - (1) In general.
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7. "Conservators" in Colorado.
  - (1) Appointment. Notice. Jury.
  - (2) Duties. Investment of funds.
  - (3) Exceptions to report. Compensation. Removal. Discharge.
8. Report, account and settlement of guardian.
9. Contracts and rights of insane persons.
10. Adjudication of insanity and its effect.
  - (1) In general.
  - (2) Presumption and evidence.
11. Restoration to capacity. Termination of guardianship.
12. Proceedings against insane persons.
  - (1) In general.
  - (2) Judgment. Execution. Limitation of actions.
13. Appeal and review.

§ 161. Notice of time and place of hearing. When it is represented to the superior court, or a judge thereof, upon



verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced on the hearing, provided that when such person is a patient at a state hospital in this state, the certificate of the medical superintendent or acting medical superintendent of such state hospital, to the effect that such patient is unable to attend such hearing shall be prima facie evidence of such fact.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1939), § 1763.**

§ 162. **Certificate of inability to attend.** When it is represented to the superior court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced on the hearing, provided that when such person is a patient at a state hospital in this state, the certificate of the medical superintendent or acting medical superintendent of such state hospital, to the effect that such patient is unable to attend on the hearing shall be prima facie evidence of such fact.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1941), § 1763a.**

§ 168. **Powers and duties of guardians.** Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward and the management of all his estate, or the care and custody of the person of his ward or the management of all his estate, according to the order of appointment, until such guardian is legally discharged, and he must give bond to such ward in like manner and with like conditions as before prescribed with respect to the guardian of a minor.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1941), § 1765.**



## GUARDIANSHIP OF INSANE PERSONS AND OTHER INCOMPETENTS.

## 1. SANITY AND DISABILITY.

The fact that a man 76 years of age desires to marry is not sufficient ground for the appointment of a guardian of his property: *Hogun v. Leeper*, 37 Okla. 655, 133 Pac. 190.

Generally one is presumed to be sane, and the burden is upon one asserting the contrary to prove it; but the appointment of a guardian for one alleged to be insane by a court having jurisdiction creates a presumption of insanity: *Schindler v. Parzoo*, 52 Or. 452, 97 Pac. 757.

To justify appointment under Code of Civil Procedure, sections 1763, 1764, it must appear that insane person's mind is so affected as to prevent comprehension of values and prudent management of property: *In re Coburn*, 11 Cal. App. 604, 105 Pac. 924.

Under Code of Civil Procedure, section 1870, subdivision 10, permitting opinion of acquaintance as to sanity of person, reason for opinion being given, person giving opinion must state reason on which it is based, and opinion has no weight other than that which reason brings to its support: *In re Coburn*, 11 Cal. App. 604, 105 Pac. 924.

It is error to permit witness to give opinion as to ability of person to manage his property, and as to whether he is liable to be imposed upon by designing parties: *In re Coburn*, 11 Cal. App. 604, 105 Pac. 924.

The willful failure of a father to maintain his child, although it may be shown as one of the items of evidence bearing upon the question of his competency, is not the same thing as incompetency, and will not support a conclusion to that effect: *Matter of Forrester*, 162 Cal. 493, 123 Pac. 283. (See page 243.)

## 2. JURISDICTION OF PROBATE COURTS.

The superior courts of the state of Washington have an inherent jurisdiction to protect the estate of nonresident



incompetent persons; and while it is generally said that the power to appoint guardians is purely statutory, the power in fact lies in the sovereignty of the state, and the procedure only is statutory: *In re Sall*, 59 Wash. 539, 110 Pac. 33, 140 Am. St. 885.

Under its constitutional and statutory powers the superior court of the state of Washington has power to appoint a nonresident the guardian of such of the estate of an incompetent nonresident as is within the state of Washington: *In re Sall*, 59 Wash. 539, 110 Pac. 33, 140 Am. St. 885. (See page 244.)

### 3. APPOINTMENT OF GENERAL GUARDIAN.

(1) **Petition for. Authority of court.** In order to justify the appointment of a guardian of an alleged incompetent person, under the provisions of Secs. 1763 and 1764 Code Civ. Proc., the court must find the person for whom the guardian is appointed mentally incompetent to take care of himself and manage his property. The evidence must show that his mind is so far gone, and so weak and feeble, that he does not realize and comprehend the value and prudent management of his property, and is not sufficiently normal to care for it in the usual acceptation of that term: *Guardianship of Coburn*, 11 Cal. App. 604, 105 Pac. 924.

An allegation in a petition for the appointment of a guardian of an incompetent person to the effect that he "is unable unassisted to properly manage and take care of his said property and by reason thereof is likely to be deceived and imposed upon by artful and designing persons and is mentally incompetent to manage his said estate; that he is by reason of old age and physical disability and weakness of mind, unable to take care of himself and manage his property," together with findings that he is "unable to properly manage or take care of himself and his property," are sufficient to justify the appointment of a guardian under the provisions of Secs. 763 and 1764 of the C. C. P. of California: *Guardianship of Coburn*, 165 Cal. 202, 131 Pac. 352.

**Probate Sup. 6.**



On a petition by a stranger that a guardian be appointed of the estate of an insane person incarcerated in the state asylum and suggesting a third person as fit and proper for the office, a brother of the insane contested the petition and suggested himself for guardian if one was to be appointed, the evidence showed that there had been a misappropriation of some part of the insane's property and that it was not likely to be returned if the brother were appointed, the original nominee was appointed in preference to the brother: *In re Martenson*, — Wash. —, 137 Pac. 340.

Where a petition for the guardianship of an alleged incompetent and the findings contain everything necessary to justify the appointment, it is not material whether section 1767 of the Code of Civil Procedure defining an incompetent person is constitutional: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

While, in considering the sufficiency of the petition and findings in proceedings for the appointment of a guardian of an incompetent, it is not necessary to rely upon section 1767 of the Code of Civil Procedure, still a decision upon the validity of that section is proper and useful as a means toward ascertaining what, under the law, constitutes incompetency sufficient to authorize the appointment of a guardian: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

A court may select any proper person to act as a guardian for an incompetent, even a stranger. It need not appoint his wife: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

In appointing a guardian for an incompetent, a court is not required to give any weight to his preference: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

Section 1767 of the Code of Civil Procedure, defining mental incompetency, is a valid enactment, and there is no occasion to go beyond its terms to learn what condition will justify the appointment of a guardian: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

The inability defined in section 1767 of the Code of Civil Procedure means a mental rather than a physical inability,



and it is immaterial how such inability has been produced. It may have resulted from old age, disease, or any other cause: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

It is not necessary, in order to warrant the appointment of a guardian of a person mentally incapable of taking care of his property, that he should also be unable to take care of his person: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

On an application for the appointment of a guardian, the alleged incompetent may himself be called as a witness and examined: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

In proceedings for the appointment of a guardian for an alleged incompetent, the petitioner may be asked on cross-examination how much money he has spent in the proceedings: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

The constitution does not guarantee the right of trial by jury in proceedings for the appointment of a guardian for an incompetent: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

An application to reopen a guardianship case for the introduction of further evidence is addressed to the discretion of the court: *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

The rule that the findings of a trial court upon disputed issues of fact are not to be overturned on appeal unless they totally lack the support of substantial evidence is applicable to findings in proceeding for the appointment of a guardian for an alleged incompetent: *In re Coburn*, 165 Cal. 202, 131 Pac. 352. (See page 245.)

**(2) Notice and personal presence.** Service of notice of an application to appoint a guardian for an insane person is sufficient when made upon him and the person having him in charge at an asylum: *Donaldson v. Winningham*, 62 Wash. 212, 113 Pac. 286.

The court has no jurisdiction to appoint a guardian ad litem for an incompetent defendant until he has been brought into court by personal service of summons: *State v. District Court*, 38 Mont. 166, 99 Pac. 293.



The notice to the incompetent required by section 1563 of the Code of Civil Procedure applies only to an original appointment of a guardian thereunder, and has no application to a petition to remove a guardian under section 1801 of the code, which empowers the court to appoint another person in the place of the removed guardian, and provides for no notice to the incompetent person: Guardianship of Tilton, 15 Cal. App. 244, 114 Pac. 594.

Where, by the order of the court, the incompetent was present at the hearing, the court was justified in questioning her to ascertain her mental condition, and was justified, if he found her mentally capable of aiding his judgment, to act according to her wishes to have the petitioner appointed as guardian, though presumptively the court acted on its judgment in making such appointment, and did not make it merely on the nomination and request of the incompetent alone: Guardianship of Tilton, 15 Cal. App. 244, 114 Pac. 594. (See page 246.)

**(3) Validity of notice.** (See page 247 )

**(4) Notice by publication.** (See page 248.)

**(5) Collateral attack.** (See page 248.)

**(6) Revocation of appointment.** The petition is not required to set forth the next of kin, in order that the citation may be served upon them. The statute only contemplates the service of the citation under a petition to revoke letters of guardianship upon the guardian sought to be removed and does not contemplate service thereof upon the next of kin: Guardianship of Tilton, 15 Cal. App. 244, 114 Pac. 594.

The averment in the petition to revoke the letters of guardianship and to appoint petitioner as such guardian, as to the friendly relation of the petitioner to the incompetent, and also to her deceased husband for many years, is sufficient to set forth the qualification of the petitioner to appear as the friend of the alleged incompetent: Guardianship of Tilton, 15 Cal. App. 244, 114 Pac. 594.



In proceedings to revoke letters of guardianship, the petition is not subjected to the tests given to complaints in actions at law; but the petition is sufficient, where its statements fully inform the court as to why it should interfere for the protection of the incompetent, and authorized the court to inquire, from its averments, whether the guardian had abused her trust, or was guilty of continued failure to perform her duties, or had an interest adverse to the faithful performance of her duties, or was unsuitable to act, or had mismanaged or wasted the estate: *Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594.

Where the findings substantially support the petition, and are amply sufficient fully to support the order complained of removing the original guardian and appointing the petitioner as guardian, and where the evidence is not returned upon appeal, it must be presumed that the evidence was sufficient to support the findings and justify the order: *Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594.

A finding as to one specific act of neglect of duty of the guardian beyond the allegations of the complaint may be disregarded, and can not be said to make the findings broader than the allegations of the petition in any objectionable sense, where all the other findings are within its averments, and sufficient: *Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594. (See page 248.)

#### 4. GUARDIAN AD LITEM.

An incompetent whether plaintiff or defendant must appear either by his general guardian, or, in case he has none or the guardian fails or refuses to appear, by a guardian ad litem appointed by the court upon the application of a friend or relative or by one of the parties to the action. In all cases where the incompetent is plaintiff the application should be by a relative or friend: *State v. District Court*, 38 Mont. 166, 99 Pac. 294. (See page 249.)

#### 5. SUPPORT, MAINTENANCE AND CUSTODY.

(See page 249.)



## 6. POWERS, DUTIES, AND LIABILITIES OF GUARDIANS.

(1) **In general.** It is not within the discretion of the guardian of an insane person to ratify and affirm the validity of a mortgage given by his ward while insane, but he is bound at his peril to disaffirm and avoid it: *Bowman v. Wade*, 54 Or. 347, 103 Pac. 76.

A guardian or other trustee has no moral or legal right to mingle trust funds with his own private property, or to profit by the use of the funds belonging to the cestui que trust, and any trustee who attempts to do so should be summarily removed: *In re Allard*, — Mont. —, 141 Pac. 665.

A guardian is an officer of the court and subject to its directions: *In re Allard*, — Mont. —, 141 Pac. 663.

A guardian must account for all accumulations from the use of the ward's funds and under no circumstances will he be permitted to profit from their use: *In re Allard*, — Mont. —, 141 Pac. 663. (See page 249.)

(2) **As to attorneys and their fees.** An attorney employed by a guardian ad litem of a minor, to prosecute an action pending in the superior court on behalf of the minor, and whose fee for his services had never been fixed by the court having jurisdiction of the action, can not maintain a writ of review to annul the order of another department of the superior court, made in the guardianship proceedings of the estate of such minor, fixing his fee for such services: *Lund v. Superior Court*, 159 Cal. 439, 114 Pac. 569.

Employment of special counsel by a guardian to defend him in the matter of proceedings for his removal will not be allowed when his general counsel is fully able to handle the matter: *In re Bayer*, — Wash. —, 141 Pac. 683. (See page 250.)

(3) **Conduct of ward's business.** The rule that a guardian making a loan of his ward's funds must exercise due care will be applied much more strictly against a guardian who makes a loan on his own responsibility than where he



makes a loan at the direction of the court: *In re Allard*, — Mont. —, 141 Pac. 663. (See page 250.)

(4) **Actions by guardian.** (See page 250.)

(5) **What is no defense to action.** (See page 250.)

#### 7. "CONSERVATORS" IN COLORADO.

(1) **Appointment. Notice. Jury.** (See page 255.)

(2) **Duties. Investment of funds.** (See page 255.)

(3) **Exceptions to report. Compensation. Removal. Discharge.** (See page 255.)

#### 8. REPORT, ACCOUNT AND SETTLEMENT OF GUARDIAN. (See page 253.)

#### 9. CONTRACTS AND RIGHTS OF INSANE PERSONS.

Though a party be entitled to jury trial, the court in refusing it is not prejudicial, where the sole question involved is whether the guardian of an imbecile ward may make a binding contract to sell his real estate without the order of the probate court: *Nichols v. Bryden*, 86 Kan. 941, 122 Pac. 1119. (See page 254.)

#### 10. ADJUDICATION OF INSANITY AND ITS EFFECT.

(1) **In general.** (See page 255.)

(2) **Presumption and evidence.** (See page 255.)

#### 11. RESTORATION TO CAPACITY. TERMINATION OF GUARDIANSHIP.

The appointment and qualification of a guardian give the court general jurisdiction over the ward, which continues in a case of insanity until the ward recovers his reason, when the right to manage the estate by the court or guardian ceases and the statute of the state of Washington requires that the court shall conduct such inquiry as it thinks



proper to establish the facts: *Jorgenson v. Winter*, 69 Wash. 573, 125 Pac. 959.

The court having jurisdiction of an insane person may accept the resignation of a guardian or discharge him without notice to the ward: *Jorgenson v. Winter*, 69 Wash. 573, 125 Pac. 959.

The court having found that the ward was sane and competent, she was entitled to the immediate full control of both her person and estate, under section 1671, Rem. & Bal. Code, and the lower court though determining a matter usually heard on the probate side of the court, was still sitting as a superior court of general jurisdiction, with ample power to make and enforce any decree or judgment proper in the premises. For this reason, following the plain mandate of the statute it is better to terminate the guardianship proceeding when the ward is found fully competent to care for and manage her person and estate, making proper provision for the payment of debts or matters involving the striking of a balance between the guardian and ward: *In re Bayer*, — Wash. —, 141 Pac. 684. (See page 256.)

## 12. PROCEEDINGS AGAINST INSANE PERSONS.

(1) **In general.** (See page 257.)

(2) **Judgment. Execution. Limitation of actions.** (See page 258.)

## 13. APPEAL AND REVIEW.

An appeal may be taken from a decision of the probate court adjudging that a person is of feeble mind and incapable of managing his affairs and appointing a guardian for his person or estate: *Old's Estate v. Appling*, 89 Kan. 340, 131 Pac. 569.

In a proceeding by a son to have a guardian appointed for his father, findings of fact are as essential to precede and support the judgment rendered by the court on the particular issue tried by him as is a verdict in a case tried by a jury: *In re Manning*, 38 Utah 281, 112 Pac. 169.



Upon a petition to revoke letters of guardianship of an incompetent person, and to appoint petitioner as guardian, where the order for the citation to issue is in the record, but not the citation itself, though the record recites that citation was issued pursuant to the order, and the guardian came in and answered fully, and had no difficulty in answering because of any insufficient statement in the citation, and as it had served its purpose, she has no cause to complain upon appeal that the citation had no sufficient statement of the nature of the proceeding to enable her to answer the petition: *Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594.

The power of one appointed guardian of the person and estate of an incompetent person is stayed pending an appeal from the order of appointment, by the filing of the undertaking on appeal provided for by section 941 of the Code of Civil Procedure. If the guardian, notwithstanding such appeal, threatens to take possession of the property of the incompetent and to act as his guardian pending the appeal, a writ of supersedeas will be issued against him: *Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26.

Such a construction of the effect of section 941 of the Code of Civil Procedure, in staying the functions of the guardian pending appeal, is not opposed to sound public policy: *Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26. (See page 259.)

## CHAPTER VIII.

### SPENDTHRIFTS.

#### IN GENERAL.

(See page 267.)



## CHAPTER IX.

## COMMITMENT AND DISCHARGE OF INSANE PERSONS.

**§ 214a. Arrest, hearing and commitment of inebriates and drug habitues**

1. Examination and commitment.
  - (1) Jurisdiction.
  - (2) Constitutionality of statute.
  - (3) Notice and opportunity to be heard.
  - (4) Adjudication of insanity.
2. Collateral attack.
3. Support, maintenance and custody.
  - (1) Liability of estate.
  - (2) Suit by directors of asylum.
  - (3) Unauthorized order as to custody.
4. Contracts and rights of insane persons.
  - (1) Contracts of conveyance. Deed. Mortgage.
5. Restoration to capacity. Discharge.
  - (1) Distinction.
  - (2) Purpose of statute.
  - (3) Power to discharge. Habeas corpus.
  - (4) Power to discharge "patient."
  - (5) Power to discharge. Effect of discharge.
  - (6) Conclusiveness of discharge.

**§ 214a. Arrest, hearing and commitment of inebriates and drug habitues.** Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that any person is so far addicted to the intemperate use of narcotics as to have lost the power of self-control, or is subject to dipsomania or inebriety, he must issue and deliver to some peace officer for service a warrant directing that such person be arrested and taken before a judge of the superior court for hearing and examination on such charge. Such officer must thereupon arrest and detain such person until a hearing and examination can be had. At the time of the arrest a copy of said affidavit and warrant of arrest must be personally delivered to said person. Such affidavit and warrant of arrest must be substantially in the



form provided by Section 2168 of the Political Code for the arrest of a person charged with insanity. He must be taken before a judge of the superior court, to whom said affidavit and warrant of arrest must be delivered to be filed with the clerk. The judge must then inform him of the charge against him, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto. The judge must by order fix such time and place for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses. Such order must be entered in the minutes of the court by the clerk and a certified copy of same served on such person. The judge may also order that notice of the arrest of such person and the hearing of the charge be served on such relatives of said person known to be residing in the county, as the court may deem necessary or proper. The hearing and examination shall be had in compliance with the provisions of Sections 2169 and 2170 of the Political Code. The judge, after such hearing and examination, if he believes the person is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety, must make an order that he be committed in a hospital for the care and treatment of the insane, designated in such order, and the order must be accompanied by a written statement of the judge as to the financial condition of the patient, and of the person legally liable for his maintenance, as far as can be ascertained; provided, that before a person shall be committed to a state hospital, satisfactory evidence shall be submitted to the trial judge showing that the person to be committed is not of bad repute or bad character, apart from his or her habit for which the commitment is made, and that there is reasonable ground for believing that the person, if committed, will be permanently benefited by treatment. Such order and statement shall be in substantially the form provided by Section 2171 of the Political Code for the commitment of insane persons. The court shall commit such person for a definite period, not to exceed two years; but provided that he may be paroled



by the medical superintendent under the same rules and condition that the insane are paroled; and provided further that the state commission in lunacy shall be given the same power to discharge any person committed under this act as contained in Section 2189 of the Political Code, upon the recommendation of the hospital superintendent, when satisfied that such person will not receive substantial benefit from further hospital treatment. Such person shall be delivered to the state hospital for the insane to which he has been committed in compliance with the provisions of Section 2172 of the Political Code, providing for the commitment and deliverance of an insane person.—**Kerr's Cyc. Pol. Code (Kerr's Cum. Supp., p. 290), § 2185c.**

#### COMMITMENT AND DISCHARGE OF INSANE PERSONS.

#### 1. EXAMINATION AND COMMITMENT. (See page 286.)

- (1) **Jurisdiction.** (See page 286.)
- (2) **Constitutionality of statute.** (See page 286.)
- (3) **Notice and opportunity to be heard.** (See page 286.)
- (4) **Adjudication of insanity.** (See page 287.)

#### 2. COLLATERAL ATTACK. (See page 287.)

#### 3. SUPPORT, MAINTENANCE AND CUSTODY. (See page 287.)

- (1) **Liability of estate.** (See page 287.)
- (2) **Suit by directors of asylum.** (See page 288.)
- (3) **Unauthorized order as to custody.** (See page 288.)

#### 4. CONTRACTS AND RIGHTS OF INSANE PERSONS. (See page 288.)

- (1) **Contracts of conveyance. Deed. Mortgage.** (See page 288.)



**5. RESTORATION TO CAPACITY. DISCHARGE.**

(See page 289.)

- (1) Distinction.** (See page 289.)
- (2) Purpose of statute.** (See page 289.)
- (3) Power to discharge. Habeas corpus.** (See page 289.)
- (4) Power to discharge "patient."** (See page 289.)
- (5) Power to discharge. Effect of discharge.** (See page 291.)
- (6) Conclusiveness of discharge.** (See page 291.)







# **PART III.**

## **JURISDICTION OF COURTS.**

### **CHAPTER I.**

#### **JURISDICTION OF COURTS.**

- 1. In general.**
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- 14. No jurisdiction when.**
  - (1) In general.**
  - (2) In county in which estate has not been "devised."**
  - (3) Over proceeds of life insurance policy.**
  - (4) To foreclose mortgage.**



- (5) To order property to escheat when.
- (6) Over timber-culture claimant's claim.
- (7) To appropriate share of heir or devisee to payment of his debts.
- (8) Where deceased was a nonresident.
- (9) Of body of deceased.
- (10) To administer a living person's estate.
- (11) To adjust disputed rights generally.
- (12) To try title.
- (13) To enforce a trust.
- (14) In what matters of guardianship.
- 15. Collateral attack.
- 16. Jurisdiction in equity.
  - (1) Exists when.
  - (2) Does not exist when.
  - (3) When same court has jurisdiction in equity and in matters of probate.
  - (4) Concurrent jurisdiction.

### 1. IN GENERAL. (See page 295.)

### 2. IS STATUTORY AND LIMITED.

Jurisdiction in probate matters is entirely statutory and there is no inherent right to a jury trial: *Stevens v. Myers*, 62 Or. 399, 126 Pac. 30. (See page 296.)

### 3. PROBATE COURTS AS COURTS OF RECORD. (See page 296.)

### 4. JURISDICTIONAL FACTS.

The question of the jurisdiction of the county court over any particular estate must first be raised in the county court and determined there, and if not so raised and determined and an appeal therefrom taken, it can not thereafter ordinarily be raised in the district court, or elsewhere than in the county court, unless the defect of jurisdiction appears upon the face of the pleadings filed in the county court, transmitted to the district court, affirmatively show a lack of jurisdiction. The question of residence is a question of fact, which can be determined only by evidence, and which, in the absence of a showing by the record, must be presumed to have been ascertained and determined by the county



court in favor of such jurisdictional facts: *Miller v. Weston*, — Colo. —, 138 Pac. 427.

The jurisdiction of the county court in probate matters, depending upon the residence of the testator or intestate, is one that may be waived by the heirs of intestate, or the heirs and beneficiaries named in the will of testate estates: *Miller v. Weston*, — Colo. —, 138 Pac. 428.

Service of citation and notice of application for an order of sale by an administrator is jurisdictional and unless proved by the proper returns on file in the county court that court had no jurisdiction to order the sale: *Browne v. Coleman*, 62 Or. 454, 125 Pac. 280. (See page 297.)

5. CONSTRUCTION OF STATUTE. (See page 298.)

6. INVOKING, EFFECT OF, AND LOSS OF.  
(See page 299.)

7. EXERCISE OF JURISDICTION. EFFECT OF ASSUMING AND REFUSING TO EXERCISE.  
PROHIBITION.

The superior court of California has no jurisdiction to vacate a claim allowed and settled, which has become final by the lapse of time, and prohibition will lie to prevent the vacating thereof on motion of the administrator of the estate: *Kowalsky v. Superior Court*, 13 Cal. App. 218, 109 Pac. 158. (See page 299.)

8. ORIGINAL AND CONCURRENT JURISDICTION.

The district court has original jurisdiction of the subject matter of trusts and partnerships and to try all the issues alleged to be involved. By the appeal it acquired jurisdiction of the persons and by entering upon the trial without objection predicated upon the jurisdiction of the probate court to try the issues, that objection must be regarded as waived: *Brown's Estate v. Stair*, — Colo. —, 136 Pac. 1005.

Under the provisions of Sec. 20, Art. 5, Const. of Idaho, the district court has original jurisdiction in all cases both  
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in law and equity, but it does not have original jurisdiction in probate and guardianship matters, as the original jurisdiction in such matters is given to the probate court under the provisions of section 21 of said article 5 of the constitution: *Idaho Trust Co. v. Miller*, 16 Ida. 308, 102 Pac. 360. (See page 300.)

## 9. OF PARTICULAR COURTS.

(1) **District courts of Arizona.** Article 6, section 6 of the constitution of Arizona, which confers upon the superior court original jurisdiction in all matters of probate, did not affect the existing rules of procedure in probate matters, but the superior court in so far as it exercises jurisdiction in matters of estates of deceased persons is a court in probate: *Garver v. Thuner*, — Ariz. —, 135 Pac. 726. (See page 301.)

(2) **District courts of Kansas.** (See page 301.)

(3) **District courts of Montana.** The jurisdiction of a district court in Montana when sitting in probate is statutory and its proceedings are regulated by statute and are in rem: *State v. District Court*, 41 Mont. 369, 109 Pac. 441. (See page 301.)

(4) **Superior courts of Washington.** (See page 301.)

(5) **Superior courts of California.** The superior court sitting in probate can not go into an accounting of a co-partnership, nor determine the ownership of shares of stock which as yet are no part of the estate, and in respect of which the administrator refuses to take steps necessary to determine their ownership. The equity court alone can and will afford relief where the powers of the probate court are inadequate to do justice: *Raish v. Warren*, 18 Cal. App. 655, 124 Pac. 95.

The superior court sitting in probate has no jurisdiction to set apart property as a homestead where the same is alleged in the petition therefor to be the separate property



of the petitioner: *Estate of Klumpke*, 47 Cal. Dec. 390, — Pac. — (March, 1914).

In the state of California the same presumption exists in favor of the acts of the superior court done in the exercise of its probate jurisdiction, as exists in favor of its acts done in ordinary litigation between parties: *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263. (See page 301.)

**(6) County courts of Colorado.** The probate court has no jurisdiction in the state of Colorado to set aside its decree of distribution after the expiration of the term at which the decree was entered: *Connolly v. Probate Court*, — Ida. —, 136 Pac. —.

A county court of Colorado sitting in probate has no jurisdiction to determine the validity of an ante-nuptial settlement made between decedent and his widow: *Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 68. (See page 304.)

**(7) County courts of South Dakota.** Under the constitution and statutes of the state of South Dakota an original or independent action or proceeding can not be brought in the county court to obtain a construction of the terms of a will, but there is given to such court the equitable power in the course of the administration of an estate, to construe a will so far as such construction may be necessary in order to administer such estate under said will and distribute same to the parties entitled thereto. The county court construes every will when it decrees a distribution thereunder, or when it orders the payment of a debt or legacy from any particular fund, and such court has jurisdiction to construe a will for the purpose of determining whether certain land was to be distributed to testatrix's children or to be set over to the petitioner at a certain price named in the will and the proceeds distributed among such children: *In re Sjurson's Estate*, 29 S. Dak. 572.

**(8) District judges in Alaska.** The Alaska Code of Civil Procedure, Sec. 763, provides that the commissioners appointed in pursuance of that act and other laws of the United States have jurisdiction within their respective pre-



cincts, subject to the supervision of the district judge, in all testamentary and probate matters. Held under this section that such supervision by the district judges is appellate only and that the district court has no original jurisdiction in probate matters: *Decker v. Decker*, 3 Alas. 121.

(9) **Circuit courts of Oregon.** The circuit court of Oregon has jurisdiction to admeasure dower: *Browne v. Coleman*, 62 Or. 454, 125 Pac. 281.

(10) **District courts of Oklahoma.** The district courts of the state of Oklahoma have jurisdiction in actions in ejectment. Prior to the admission of the state the will of a deceased Indian was duly probated and executed by the executor in the Indian Territory and all the debts of the estate paid. There was but one beneficiary under the will. Held that a district court of the state has jurisdiction of an action in ejectment to recover possession of or of a suit to remove claim from title to the allotted lands of deceased brought by the heirs at law of the deceased against the beneficiary under the will: *Austin v. Chambers*, 33 Okla. 40, 124 Pac. 310.

## 10. EXCLUSIVE AND CONFLICTING JURISDICTION.

(1) **Exclusive jurisdiction.** Inasmuch as exclusive original jurisdiction was given to the superior courts in the state of Washington over the subject of probate proceedings such jurisdiction carries with it the presumption of the integrity of the judgments of such courts, the same as is carried by the judgments of courts of general jurisdiction: *Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 18. (See page 304.)

(2) **County courts of Oregon.** In the state of Oregon the county court has exclusive jurisdiction in the probate of wills: *Stevens v. Myers*, 62 Or. 399, 126 Pac. 33.

The jurisdiction of the probate courts in Oregon to administer upon the estates of decedents is primary and exclusive: *State v. First Nat. Bank*, 61 Or. 551, 123 Pac. 714.



Under the constitution of the state of Oregon the county court has exclusive jurisdiction in the first instance pertaining to a court of probate; that is, to take proof of wills and to grant and revoke letters testamentary, of administration and of guardianship and whenever a will is probated in such court in common form it may thereafter be contested in that court by a direct proceeding brought within one year after the probating, but the decree of the county court is immune from collateral attack: *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 474. (See page 305.)

**(3) Conflicting jurisdiction.** Under the constitution of California of 1849, probate jurisdiction was vested in the county courts, and general equity jurisdiction in the district courts, but under the present constitution both branches of jurisdiction, while remaining distinct, are administered in the superior courts. With a constitution conferring exclusive probate jurisdiction upon one court, it is not competent for the legislature to empower another court, clothed only with jurisdiction in general equity, to set aside wills obtained by fraud or undue influence, and to declare void any paper purporting to be a last will, and to set aside the probate judgments of the court constitutionally vested with probate jurisdiction, for fraud, concealment, or perjury. The statute of 1862 (Stats. 1862, p. 27), giving the district court power to set aside a will or a probate decree on the ground of fraud and the like, was unconstitutional, for the constitution gave county courts exclusive probate jurisdiction: *Stead v. Curtis*, 205 Fed. 439. (See page 305.)

11. EXISTS IN WHAT CASES. (See page 306.)

12. IN PARTICULAR MATTERS.

Where after an administrator of the estate of an intestate had been appointed one of the heirs made charges in the administration proceedings against the other heirs that they had concealed, embezzled, and conveyed away property belonging to the estate, the charges were dismissed for want of jurisdiction: *In re Syerley's Estate*, 87 Kan. 307, 124 Pac. 406.



The statutes of Kansas conferring jurisdiction on probate courts to allow and admit to record authenticated copies of foreign wills executed and proved according to the laws of any state or territory of the United States or of any country other than the United States and territories thereof, and giving to such copies when so allowed and recorded, the same effect as if the original will had been proved in Kansas, were not intended to deny such courts jurisdiction to probate an original will executed in a foreign state or county which disposes of property situated in Kansas: *Thompson v. Parnell*, 81 Kan. 119, 105 Pac. 502. (See page 308.)

13. TO SET ASIDE ITS OWN DECREES. (See page 308.)

14. NO JURISDICTION WHEN.

(1) **In general.** A probate court has no jurisdiction or authority in the administration of an estate of a decedent to order or confirm the sale of real estate which belongs to some one else, and the title to which is vested in another, and which property did not in fact or law belong to the estate being administered: *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796. (See page 309.)

(2) **In county in which estate has not been "devised."** (See page 310.)

(3) **Over proceeds of life insurance policy.** The proceeds of the two mutual benefit certificates standing in the name of a testator at the date of his death held not to be a part of his estate and consequently were not within the jurisdiction of the probate court, though they had been paid over to the administrator. Such proceeds can be disposed of only in accordance with the by-laws, rules, and regulations of the organizations issuing the certificates, subject to change by the beneficiary in certain methods therein mentioned. The by-laws provided that the proceeds should go only to blood relations of the beneficiary. Appellants were strangers in blood to testator. Respondents were his heirs at law, but they claimed that the proceeds, though no part of the estate, should be distributed to them by the



probate court as the heirs of decedent, which the appellate court held that court had no jurisdiction to do. Whether the bequest in the will amounted to a change in the disposition of the proceeds within the by-laws of the organizations was not decided: *Finn v. Walsh*, 19 N. Dak. 64. (See page 311.)

(4) **To foreclose mortgage.** (See page 311.)

(5) **To order property to escheat when.** (See page 311.)

(6) **Over timber-culture claimant's claim.** (See page 311.)

(7) **To appropriate share of heir or devisee to payment of his debts.** (See page 312.)

(8) **Where deceased was a nonresident.** The word "resident" as used in Rem. & Bal. Code, Sec. 1284 of the state of Washington, providing that wills shall be proved in the county in which decedent was a resident at the time of his death, means a strict legal residence or domicile and though ordinarily the domicile of the husband is that of the wife, where the husband has deserted the wife she may acquire a domicile or residence of her own which will govern in the matter of probate proceedings in her estate: *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 90. (See page 312.)

(9) **Of body of deceased.** (See page 312.)

(10) **To administer a living person's estate.** (See page 313.)

(11) **To adjust disputed rights generally.** When the fact of the conveyance of the share of an heir, devisee, or legatee in an estate is in dispute, the provisions of section 1678, Code of Civil Procedure of the state of California, do not apply and the determination of such validity is not a matter within the probate jurisdiction of the superior court: *Estate of Howe*, 161 Cal. 152, 118 Pac. 515. (See page 313.)

(12) **To try title.** The county court in the state of Oregon has no power or authority to determine a dispute be-



tween an administrator and a third person, concerning the title to property, but such question must be tried in a court of ordinary jurisdiction: *Harrington v. Jones*, 53 Or. 237, 99 Pac. 936. (See page 314.)

(13) **To enforce a trust.** (See page 315.)

(14) **In what matters of guardianship.** (See page 315.)

## 15. COLLATERAL ATTACK.

Where the want of jurisdiction appears on the face of the record a decree of the county court ordering a sale of decedent's real estate is void and can be attacked either directly or collaterally; but if the jurisdictional infirmity could be discovered only by evidence aliunde the record, then the decree was not void but voidable and was good until set aside by direct attack: *Pinnacle Gold Mining Co. v. Popst*, 54 Colo. 451, 131 Pac. 417.

Where the probate court has jurisdiction of both the parties in interest and the subject matter, though what the court does may be erroneous, it is not void and is not subject to collateral attack: *Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 18.

The judgments and orders of the county courts of the state of Oregon sitting in probate can not be collaterally impeached except where the want of jurisdiction affirmatively appears upon the face of the record: *Smith v. Whiting*, 55 Or. 393, 106 Pac. 793.

When an application is presented to the probate court for the appointment of an administrator of a surviving partnership and the court finds the existence of the facts authorizing it to exercise jurisdiction, the action of the court in making the appointment is not subject to collateral attack: *Thompson v. Parnell*, 81 Kan. 119, 105 Pac. 502. (See page 316.)



**16. JURISDICTION IN EQUITY.**

**(1) Exists when.** Equity has jurisdiction to vacate and set aside judgments and orders of the county court in probate cases, when such judgments and orders were obtained by fraud. A suit brought to set aside an order of the county court approving the final settlement of an administrator is a "direct" and not a "collateral" attack upon such order, although other relief was also sought: *Johnson v. Filtsch*, — Okla. —, 138 Pac. 165. (See page 317.)

Where a separation agreement has been fully executed, and one of the parties to it is dead and the other is making unwarranted claims in probate upon the estate of the deceased, and his representative interposes the separation agreement as a defense by way of estoppel to those claims, the probate court has equitable jurisdiction for the purpose of passing upon the validity and effect of such agreement: *In re Yoell's Estate*, 164 Cal. 540, 129 Pac. 999. (See page 317.)

**(2) Does not exist when.** (See page 318.)

**(3) When same court has jurisdiction in equity and in matters of probate.** (See page 318.)

**(4) Concurrent jurisdiction.** (See page 320.)







## **PART IV.**

### **EXECUTORS AND ADMINISTRATORS.**

**EXECUTORS AND ADMINISTRATORS.**

**THEIR LETTERS AND BONDS.**

**REVOCATION OF LETTERS, SPECIAL ADMINISTRATORS.**

**WILLS FOUND AFTER LETTERS GRANTED.**

**DISQUALIFICATION OF JUDGES. TRANSFERS.**

**REMOVALS AND SUSPENSIONS.**

### **CHAPTER I.**

#### **LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED.**

- 1. Letters testamentary.**
  - (1) In general.**
  - (2) Application by foreign executor.**
- 2. Jurisdiction of courts.**
- 3. Appointment of executor by court.**
- 4. Objections to appointment.**
- 5. Failure to apply or to qualify. Effect of.**
- 6. Letters of administration with will annexed.**
  - (1) In general.**
  - (2) Where executor appointed can not or will not act.**
  - (3) Right to nominate. Nonresidents. Preference.**
  - (4) Right to letters. Foreign wills.**
  - (5) To be issued when. Subsequently discovered property.**
  - (6) Who are not entitled to.**
- 7. Validity and effect of appointment.**
- 8. Appeal.**

#### **1. LETTERS TESTAMENTARY.**

- (1) In general. (See page 332.)**

**(2) Application by foreign executor.** A nonresident executor of a foreign will can not, as such, nominate a resident of this state, who is not otherwise "interested in the will,"



so as to entitle him to letters of administration with the will annexed as against the public administrator: *Estate of Meier*, 165 Cal. 456, 132 Pac. 764. (See page 332.)

**2. JURISDICTION OF COURTS. (See page 334.)**

**3. APPOINTMENT OF EXECUTOR BY COURT.  
(See page 334.)**

**4. OBJECTIONS TO APPOINTMENT. (See page 335.)**

**5. FAILURE TO APPLY OR TO QUALIFY. EFFECT OF.  
(See page 336.)**

Mere immorality is not sufficient to justify a court's refusal to appoint as executor or executrix one who is duly nominated for such appointment by will: *Estate of Munroe*, 161 Cal. 10, 118 Pac. 242.

A will appointing two daughters, M. and M. B., "to be the sole executors of this my will," and directing that if the testatrix should die before M. and M. B. shall be of full age the H. T. Co. should "act as such executor and trustee until they the said Muriel Campbell and Mary Beatrice Campbell shall reach their majority and are qualified to act as such executrices and trustees" (the company and the daughters having been appointed trustees under the will), the elder daughter coming of age after the death of the testatrix and before the will is probated is entitled to letters testamentary with the H. T. Co. This construction presents less difficulty than any other, "their" majority being construed as meaning "as they respectively reach the age of majority," and "and" to mean "or": *Estate of Parker*, 19 Haw. 393. (See page 336.)

**6. LETTERS OF ADMINISTRATION WITH WILL  
ANNEXED.**

**(1) In general. (See page 336.)**

**(2) Where executor appointed can not or will not act.**  
Where a person nominated in a will as executrix is found to



be incompetent, letters of administration with the will annexed should issue as in cases of intestacy: *Estate of Munroe*, 161 Cal. 10, 118 Pac. 242. (See page 337.)

**(3) Right to Nominate. Nonresidents. Preference.**  
(See page 337.)

**(4) Right to letters. Foreign wills.** The general provisions relating to the issuance of letters of administration with the will annexed control in the case of foreign wills, except in so far as there is special provision to the contrary in the article on foreign wills: *Estate of Meier*, 165 Cal. 456, 132 Pac. 764.

In the case of a foreign will, when a nonresident executor does not apply for letters in this state, where there are applications for appointment by two or more persons "interested in the will" who are competent to serve as administrator under the laws of this state, the relative rights of the parties are determined by the rules applicable in cases of intestacy: *Estate of Meier*, 165 Cal. 456, 132 Pac. 764.

In the case of a foreign will, when the nonresident executor does not apply for letters in this state, any person "interested in the will," which term includes any devisee or legatee, or an assignee of a devisee or legatee, who is in all respects competent to serve as administrator under the laws of this state, is entitled as a matter of right to such letters in preference to any person "not interested in the will," by virtue of the provisions specially applicable to foreign wills: *Estate of Meier*, 165 Cal. 456, 132 Pac. 764.

Sections 1322-1324 of the Code of Civil Procedure, dealing especially with foreign wills, prevail over all conflicting provisions as to all the matters arising out of that article of the code; and thereunder the executor in a foreign will is entitled to letters if he applies therefor, but in the absence of his application letters must be granted to "any other person interested in the will" who applies for them, provided the applicant has the qualifications prescribed by law for administrator: *Estate of Meier*, 165 Cal. 456, 132 Pac. 764.



In the case of a foreign will, when the nonresident executor does not apply for letters in this state, where none of the applicants is "interested in the will," the rule applicable in cases of intestacy control. Such rules require the appointment of the public administrator in preference to one whose only claim, apart from the fact that he is legally competent, is based on the nomination of the executor of the will or the nomination of some one interested in the will, other than the surviving husband or wife, who is himself incompetent to serve as administrator: *Estate of Meier*, 165 Cal. 456, 132 Pac. 764.

In the case of a foreign will, any attempted nomination of another as administrator by one "interested in the will" who is himself incompetent to serve as administrator under the laws of this state, except where the nomination is made by the surviving husband or wife, is ineffectual for any purpose: *Estate of Meier*, 165 Cal. 456, 132 Pac. 764. (See page 338.)

**(5) To be issued when.** Subsequently discovered property. After death of executor, discharged because he could find no property, court held authorized to appoint administratrix c. t. a., to administer subsequently discovered property without first vacating order of discharge, under Code Civ. Proc., Sec. 1698, providing that final settlement shall not prevent subsequent letters where other property is discovered or if it should otherwise become necessary: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. (See page 339.)

**(6) Who are not entitled to.** A relative of a deceased person who is not entitled on distribution to succeed to any portion of the estate is not entitled to letters of administration with the will annexed: *Estate of Winbigler*, 46 Cal. Dec. 455, 137 Pac. 1. (See page 340.)

## **7. VALIDITY AND EFFECT OF APPOINTMENT.**

(See page 340.)

## **8. APPEAL. (See page 340.)**



CHAPTER II.

OATH AND SEAL TO LETTERS.

1. Oath required.
  2. Necessity of seal to letters.
  3. Effect of omitting seal.
- 
1. Oath required. (See page 346.)
  2. Necessity of seal to letters. (See page 346.)
  3. Effect of omitting seal. (See page 347.)

CHAPTER III.

LETTERS OF ADMINISTRATION, TO WHOM AND THE ORDER  
IN WHICH THEY ARE GRANTED.

(See page 348.)

§ 243. Preference of persons equally entitled.

§ 243. Preference of persons equally entitled. Of several persons claiming and equally entitled to administer, relatives of the whole blood must be preferred to those of the half blood.—Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1861), § 1366.



## CHAPTER IV.

## PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.

§ 265a. Special notice to heirs. Request for how given.

## LETTERS OF ADMINISTRATION.

1. Granting or refusing administration in general.
2. Jurisdiction of courts.
3. Preliminary proof.
4. Letters on estate of minor.
5. Petition for letters.
  - (1) In general.
  - (2) Application by creditors.
  - (3) Construction of statute.
  - (4) Statement of facts.
  - (5) Sufficiency of petition.
  - (6) To be granted in what court and county.
6. Order of appointment.
7. Who are entitled to letters.
8. Priority. Preference.
9. Right to nominate. Letters to others than those entitled.
  - (1) In general.
  - (2) Nonresidents.
10. Letters where several are equally entitled.
11. Discretion of court.
12. Notice and hearing.
13. Contest of application.
  - (1) In general.
  - (2) What questions are involved.
  - (3) Who may appear and contest.
  - (4) Allegations. Proof. Presumption.
14. Waiver of right. Delay.
15. Validity of appointment and letters.
16. Collateral attack.
17. Order granting letters. Effect of.
18. Vesting of appointee with office.
19. Who are not entitled to appointment.
20. Competency. Disqualification to act.
  - (1) In general.
  - (2) Want of understanding.
  - (3) Drunkenness.
  - (4) Improvidence.
  - (5) Want of integrity.



21. Nonresidents.

22. Appeal.

**§ 265a. Special notice to heirs. Request for. How given.**

At any time after the issuance of letters testamentary or of administration upon the estate of any decedent, any person interested in said estate, whether as heir, devisee, or legatee, or the attorney for such heir, devisee, or legatee, may serve upon the executor or administrator (or upon the attorney for the executor or administrator), and file with the clerk of the court wherein administration of such estate is pending a written request, stating that he desires special notice of any or all of the following mentioned matters, steps or proceedings in the administration of said estate, to-wit:

1. Filing of petitions for sales, leases or mortgages of any property of the estate.

2. Filing of accounts.

3. Filing of petitions for distribution.

4. Filing of petitions for partition of any property of the estate.

Such request shall state the postoffice address of such heir, devisee, or legatee, or his attorney, and thereafter a brief notice of the filing of any of such petitions or accounts, except petitions for sale of perishable property or other personal property, which will incur expense or loss by keeping, shall be addressed to such heir, devisee, or legatee, or his attorney, at his stated postoffice address, and deposited in the United States postoffice with the postage thereon prepaid, within two days after the filing of such petition or account; or personal service of such notices may be made on such heir, devisee, or legatee, or his attorney, within said two days and such personal service shall be equivalent to such deposit in the postoffice, and proof of mailing or of personal service must be filed with the clerk before the hearing of such petition or account. If upon the hearing it shall appear to the satisfaction of the court that the said notice has been regularly given, the court shall so find in its order of

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judgment and such judgment shall be final and conclusive upon all persons.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1863), § 1380.**

#### LETTERS OF ADMINISTRATION.

### 1. GRANTING OR REFUSING ADMINISTRATION IN GENERAL.

It is well established that after final settlement of an estate, the court having probate jurisdiction is not bound to issue further letters of administration, and should not do so unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do. This is implied by section 1698, Code of Civil Procedure, providing that the final settlement of an estate, as provided in the code, shall not prevent the issuance of further letters of administration thereon if other property of the estate be discovered, or if a good cause appears therefor. The implication is that there should be no issue of subsequent letters, where no other property is discovered and no good cause appears therefor: *O'Brien v. Nelson*, 164 Cal. 573, 129 Pac. 985. (See page 365.)

### 2. JURISDICTION OF COURTS.

The power to grant letters of administration upon the estate of a deceased person is purely statutory and intestacy is a necessary prerequisite to the granting of general letters of administration in the state of Washington: *In re Guye's Estate*, 54 Wash. 264, 103 Pac. 25, 132 Am. St. 1111. (See page 366.)

### 3. PRELIMINARY PROOF. (See page 367.)

### 4. LETTERS ON ESTATE OF MINOR. (See page 368.)

### 5. PETITION FOR LETTERS.

#### (1) In general. (See page 369.)



**(2) Application by creditors.** The right of a creditor to administer the estate depends upon his supposed interest therein, and, when the status of creditor ceases, his right to administer upon the estate ceases: *In re Englehart's Estate*, 17 N. M. 299, 128 Pac. 67. (See page 369.)

Under the laws of the state of Washington a creditor has no absolute right to administer on the estate of his deceased debtor. The most he has is a privilege exercisable only in the event of the nonaction of persons having the prior right, such persons having the right to nominate a suitable person to act in their stead, subject to confirmation by the court, and a creditor has no right to object to such nomination: *Larson v. Stewart*, 69 Wash. 223, 124 Pac. 384.

A person who buys claims against an estate for the purpose of qualifying himself as an administrator acquires no rights thereby to be appointed administrator: *In re Hoss's Estate*, 59 Wash. 360, 109 Pac. 1071.

A creditor is not entitled to letters of administration in preference to the widow of the deceased, upon allegations in his petition that she conspired to murder her husband, it not being pretended that she had been convicted or even charged with such crime: *Estate of Agoure*, 165 Cal. 427, 132 Pac. 587. (See page 369.)

**(3) Construction of statute.** (See page 370.)

**(4) Statement of facts.** The facts essential to the granting of administration of the estate of a deceased are, death of the deceased, his intestacy, and that he left an estate to be administered in the county in which the application for administration is made: *Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860.

Upon an application for letters of administration, the exact date of the death of the deceased is not essential to the jurisdiction of the probate court, and not necessary for decision upon the application for the appointment of administrators: *Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860. (See page 370.)



**(5) Sufficiency of petition.** (See page 371.)

**(6) To be granted in what court and county.** Shares of the capital stock of a corporation represent the interest of the shareholder in the property of the corporation and the Kansas statute declares that they shall be treated as personal property, but in the absence of legislation fixing the situs of such property for the purpose of administration elsewhere, it must be regarded as at the domicile of the shareholder and the probate court of a county in which the stockholder was not domiciled rightfully refused to appoint an administrator therefor: *Miller's Estate v. Executrix of Miller's Estate*, — Kan. —, 136 Pac. 257.

The appointment by the probate court of a county of the state of Kansas, of an administrator of the estate of one who at the time of his death was an inhabitant and resident of another county thereof, is wholly void, and a release of a mortgage belonging to the estate, executed by one so appointed as administrator under color of an order of such court, is without legal effect: *Anderson v. Walter*, 78 Kan. 781, 99 Pac. 270. (See page 372.)

## 6. ORDER OF APPOINTMENT.

Where no one falling within any one of the first ten classes of persons who may be appointed administrator of the estate of an intestate makes application therefor, any person in class No. 11 may apply and that class consists of "any person legally competent": *McCormick v. Brownell*, 25 Ida. 11, 136 Pac. 615.

The surviving husband or wife is entitled to general letters of administration to the exclusion of any other person (Rev. Codes of Montana, Sec. 7432), unless at least one of the grounds of incompetency enumerated in section 7436 is shown: *State v. District Court*, — Mont. —, 140 Pac. 733. (See page 372.)

## 7. WHO ARE ENTITLED TO LETTERS.

Under section 1365 of the Code of Civil Procedure, specifying the order of preference in granting letters of admin-



istration, relatives of the deceased are entitled to administer only when they are entitled to succeed to his personal estate or some portion of it. Such right of succession is a controlling limitation on the right of administration: *Estate of Crites*, 155 Cal. 392, 101 Pac. 316.

Where the executor of the will of a deceased husband was the sole devisee of his estate, and obtained distribution of his estate and afterward died, the widow, who both had an agreement of separation upon supposed equal division of the community property, and had an allowed claim against the husband's estate, may be appointed administratrix of her deceased husband's estate, for the purpose of enabling her to sue for fraud upon her rights as wife and creditor to recover land fraudulently conveyed by her husband to his brother, who became his executor, to defeat her rights as wife and creditor: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

The existence of an interlocutory decree of divorce does not take away the right of the widow to administer the estate of her husband: *Estate of Martin*, 166 Cal. 399, 137 Pac. 2.

A relative of a deceased person, who is not entitled on distribution to succeed to any portion of the estate, is not entitled to letters of administration with the will annexed: *Estate of Winbigler*, 166 Cal. 434, 137 Pac. 1.

Where a testator provides that if his estate is worth the sum of \$40,000 at the time of his death it shall be divided among certain designated relatives, and that a designated niece and nephew shall receive nothing, and then subsequently provides that if his estate shall be worth more than such sum "then all heirs shall receive the larger amount," such niece and nephew are not entitled to any portion of the estate in the event of the latter contingency, and are therefore not entitled to letters of administration with the will annexed as against a named legatee: *Estate of Winbigler*, 166 Cal. 434, 137 Pac. 1.



A person holding, as assignee, portions of the estate of a deceased person from one who is the sole legatee under the will of the testator is a person interested in the estate, and as such entitled, upon petition, to letters of administration: *In re Rankin's Estate*, 164 Cal. 138, 127 Pac. 1034.

The assignee of portions of an estate from the sole beneficiary under the will of the deceased, presenting a copy of the foreign will and the probate thereof, duly authenticated, according to section 1323 of the Code of Civil Procedure, is entitled, if competent to serve as administrator in this state, to letters of administration with the will annexed, as against one who, like the public administrator, is not "interested in the estate": *In re Rankin's Estate*, 164 Cal. 138, 127 Pac. 1034.

It is immaterial, so far as the public administrator is concerned, that nothing of value was paid by the assignee of portions of the estate of a deceased person: *In re Rankin's Estate*, 164 Cal. 138, 127 Pac. 1034. (See page 373.)

#### 8. PRIORITY. PREFERENCE.

A child of a deceased person who has petitioned for letters of administration must be preferred as against the nominee of two remaining children of the decedent, which nominee is not entitled to succeed to any part of the personal estate of the decedent: *Estate of Myers*, 9 Cal. App. 694, 100 Pac. 712.

Because he claims to own as his separate property, land believed by the court to be community property, a surviving husband does not forfeit his statutory right to preference in the issuance of letters of administration on his deceased wife's estate, nor can he be compelled to give up such claim as a condition precedent to the granting of letters: *Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 193.

The words "no relatives or next of kin" in the proviso in section 90, Probate Act (Laws 1873, p. 269), as amended by Laws 1881, p. 6, Sec. 1, relate to such relatives or next of kin as are mentioned in the enacting clause of the section so



that next of kin other than those mentioned have no priority in the right to letters of administration over any suitable person: In re Hoss's Estate, 59 Wash. 360, 109 Pac. 1072.

Under Code Civ. Proc., Sec. 1365, providing that relatives are entitled to administer only where they succeed to some portion of estate, child taking under will held entitled to preference over widow taking nothing: In re Crites's Estate, 155 Cal. 392, 101 Pac. 316. (See page 374.)

## 9. RIGHT TO NOMINATE. LETTERS TO OTHERS THAN THOSE ENTITLED.

(1) **In general.** Where a person entitled to letters of administration does not wish to act, he is entitled to nominate some competent person to do so and to request the court to appoint such person, but such request may be withdrawn and the person making it may thereafter make application that he himself be appointed such administrator: McCormick v. Brownell, 25 Ida. 11, 136 Pac. 614.

Where one entitled to do so requests the appointment of a certain person as administrator, such request impliedly authorizes such person to take the necessary steps to secure the removal of any obstacle to the exercise of the right to so nominate, and a request by the proposed administrator in his petition for his own appointment, that a prior administrator be removed was properly incorporated in his petition: In re Koller's Estate, 40 Mont. 137, 105 Pac. 550.

The husband or wife, as the case may be, has authority under the statutes of Washington to name an executor for community as well as for separate property and the executor thus named can not be superseded by an administrator appointed at the suggestion of the surviving spouse: In re Guye's Estate, 54 Wash. 264, 103 Pac. 26, 132 Am. St. 1111.

Under the provisions of section 5351, Rev. Stats. 1887 of the state of Idaho, persons falling under subdivisions 4 and 5 thereof are not entitled to nominate a person falling under subdivision 11 and have that person advanced to the rank and class occupied by the person making the nomination: In re Daggett's Estate, 15 Ida. 504, 98 Pac. 849.



Under the provisions of section 5351, Rev. Stats. 1887 of the state of Idaho, only persons designated in subdivision 1 thereof are entitled to nominate some other person for the appointment of administrator and thereby have such person advanced to the rank and class of the one making the request or nomination: *In re Daggett's Estate*, 15 Ida. 504, 98 Pac. 849.

When a person entitled to administer upon an estate files a written application under the provisions of section 5365, Rev. Stats. 1887 of the state of Idaho, requesting the appointment of some other competent person, such request and application are addressed to the discretion of the court and the statute is not mandatory upon the court: *In re Daggett's Estate*, 15 Ida. 504, 98 Pac. 849.

Section 5366, Rev. Stats. 1887 of the state of Idaho must be construed in view of and in connection with Secs. 5351 and 5365 and, where a number of persons are requesting or petitioning the appointment of strangers or persons falling under subdivision 11 of Sec. 5351, and one only of the persons making such requests falls within the classes of preferred persons under Sec. 5366 and the first five subdivisions of Sec. 5351, such person is entitled to nominate any competent person for administration, and it is the duty of the court to appoint the person so nominated: *In re Daggett's Estate*, 15 Ida. 504, 98 Pac. 850. (See page 375.)

(2) **Nonresidents.** Except in the case of a surviving husband or wife, the competent nominee of a relative who is incompetent by reason of nonresidence is not entitled to letters of administration, on an original application, by virtue of his nomination by such relatives: *Estate of Martin*, 163 Cal. 803, 125 Pac. 1055. (See page 377.)

#### 10. LETTERS WHERE SEVERAL ARE EQUALLY ENTITLED.

The right to letters of administration of the estate of a decedent given to children is an absolute right vested by the statute in such children and such right can be claimed only in the manner provided by the statute. The court having



found that both children were competent, was limited in its discretion to determining which of them should receive the appointment if both were not to be appointed: *In re Barrett's Estate*, — Wyo. —, 138 Pac. 866. (See page 379.)

#### 11. DISCRETION OF COURT. (See page 379.)

#### 12. NOTICE AND HEARING.

When the notice for the appointment of an administrator has been given, the effect thereof is to bring all the parties who had or acquired any interest in the estate into court and that not only for the one purpose of appointing the administrator but also that the court will in due time deal with the property of the deceased and will dispose of and distribute it to those who may be entitled to it: *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 526. (See page 380.)

#### 13. CONTEST OF APPLICATION.

##### (1) In general. (See page 381.)

(2) **What questions are involved.** The granting of letters of administration on the estate of a deceased man, to a woman who subsequently, in proceedings to establish heirship in his estate, claimed to be his surviving wife, is not an adjudication of her status as his widow when it does not appear that she based her claim to letters on the ground that she was his surviving wife, or that any such issue was ever tendered to the court for determination: *Estate of Hancock*, 156 Cal. 804, 106 Pac. 58. (See page 382.)

(3) **Who may appear and contest.** The disappearance of a husband for three years prior to his wife's death is not sufficiently long to raise a presumption of his death and the wife's sister, in order to have a standing as a contestant of the wife's will, must show that the husband was either dead or divorced: *In re Lieb's Estate*, 70 Wash. 374, 126 Pac. 914. (See page 382.)

##### (4) Allegations. Proof. Presumption. (See page 383.)



#### 14. WAIVER OF RIGHT. DELAY.

A wife is barred from asserting after her husband's death in order that she might obtain letters of administration on his estate, his breach of an ante-nuptial agreement between them whereby she relinquished all claim in his estate in consideration of his support and education of her daughter during the daughter's minority and the payment of \$100 per annum to the wife, where she for ten years succeeding the breach of the covenant to support and educate the daughter and up to the time of her husband's death continued to receive and accept the annual payment of the \$100: *Estate of Warner*, 47 Cal. Dec. 28, 140 Pac. 583.

The failure of a surviving spouse and next of kin, in their order, to apply for letters of administration within forty days after decedent's death constitutes a waiver of the right, after which the court has discretionary power to appoint any suitable person: *Koloff v. Chicago M. & P. S. Ry. Co.*, 71 Wash. 543, 129 Pac. 400.

Under the provisions of the statutes of Idaho the nominee of a nonresident brother of the deceased, being competent, will be appointed administrator in preference to a creditor who has been guilty of delay in making his application and did not make same until after that of the brother's nominee: *Wright v. Merrill*, — *Ida.* —, 140 Pac. 1102. (See page 383.)

#### 15. VALIDITY OF APPOINTMENT AND LETTERS.

(See page 383.)

#### REFERENCES.

Effect of misnaming estate in granting letters, see note 46 L. R. A. (N. S.) 274.

#### 16. COLLATERAL ATTACK.

The appointment of an administrator is not open to collateral attack merely because the appointee is not next of kin to the deceased whose estate is being administered: *Hanson v. Swan*, — *Kan.* —, 140 Pac. 100. (See page 386.)



### 17. ORDER GRANTING LETTERS. EFFECT OF.

Where a proper petition was presented to the court for the appointment of a specified person as administrator and such person was appointed but failed to qualify, the jurisdiction thus obtained by the court was sufficient to authorize the appointment of any person whom the court might deem competent and suitable, without any formal application by the person so appointed, or formal renunciation by the person who failed to qualify: *Wilkie v. Bailey*, 74 Wash. 241, 133 Pac. 388.

As a general rule all acts by an executor or administrator done in the due and legal course of administration are valid and binding, even though the appointment is voidable and the letters are afterward revoked, or the incumbent discharged from his office: *Amberson v. Caudler*, 17 N. Mex. 455, 130 Pac. 255.

An order appointing administrators is conclusive only between the parties and their privies in respect of the matter directly adjudged, and these matters could only be those things necessary and essential in conferring jurisdiction and establishing the authority of the court to make the order. *Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860. (See page 388.)

### 18. VESTING OF APPOINTEE WITH OFFICE.

An executor is without power to act as such until he has given bond as required by statute, unless bond shall have been waived in the will: *Amberson v. Caudler*, 17 N. Mex. 455, 130 Pac. 255. (See page 388.)

### 19. WHO ARE NOT ENTITLED TO APPOINTMENT.

Under existing laws in the state of North Dakota a foreign corporation is incompetent to receive letters of administration issued by the courts of that state: *Gunrow v. Simonitsch*, 21 N. Dak. 281. (See page 389.)



## 20. COMPETENCY. DISQUALIFICATION TO ACT.

(1) **In general.** The existence of an interlocutory decree does not deprive the widow of the right to administer on her husband's estate: *Estate of Martin*, 166 Cal. 399, 137 Pac. 2.

A daughter in applying for letters of administration on her mother's estate, does not establish her incompetency for want of integrity, by offering in evidence a decree of divorce, which was admissible for the purpose for which it was introduced, although it showed that her mother had been guilty of adultery: *Estate of Elliott*, 165 Cal. 339, 132 Pac. 439.

A creditor of a deceased person can not contest the widow's priority of right to letters of administration, merely by charging her with having entered into a conspiracy to murder her husband, and by innuendo and insinuation implying that his death was the outcome of this conspiracy: *Estate of Agoure*, 165 Cal. 427, 132 Pac. 587.

An interlocutory decree of divorce does not deprive a husband of his prior right to letters of administration on the estate of his deceased wife: *Estate of Seiler*, 164 Cal. 181, 128 Pac. 324. And the entry of the final decree does not operate retroactively to deprive husband of rights of inheritance: *Id.* (See page 390.)

(2) **Want of understanding.** (See page 390.)

(3) **Drunkenness.** (See page 390.)

(4) **Improvidence.** (See page 390.)

(5) **Want of integrity.** A daughter of the decedent does not show "want of integrity" disqualifying her as administratrix by introducing in evidence, in the assertion of her right to administrate as against one who claims to be her mother's surviving husband, a decree of divorce against him rendered within a year prior to his marriage with the mother, the decree showing that the divorce was on the ground of his adultery with the mother: *Estate of Elliott*, 165 Cal. 339, 132 Pac. 439.



Evidence that a woman nominated as executrix of a will was not only immoral but promiscuous, prone to disorderly conduct, once the consort of a man who in spite of difference in race lived with her at a saloon in the lower part of the city, and who had been arrested several times for vagrancy, and was living at the time of applying for letters testamentary in meretricious relations with a man not her husband, is sufficient to justify a finding of her want of integrity, and an order refusing her letters testamentary on that account will not be interfered with on appeal: *Estate of Munroe*, 161 Cal. 10, 118 Pac. 242. (See page 391.)

## 21. NON-RESIDENTS.

Under section 1369 of the California Code of Civil Procedure, a nonresident of that state is neither competent nor entitled to serve as administrator of the estate of a deceased person: *Estate of Martin*, 163 Cal. 440, 125 Pac. 1055.

A special or a general administrator of another state can not demand judicial recognition in the state of Kansas to recover damages for the death of one who resided in and whose death took place in Kansas: *Metrakos v. Kansas City M. & G. Ry. Co.*, 91 Kan. 342, 137 Pac. 954.

Whether a person appointed administrator of an estate is a resident of the state is a question of fact to be determined by the court appointing him, and its judgment can not be impeached collaterally: *Livermore v. Ayres*, 86 Kan. 50, 119 Pac. 549.

In the absence of any direct prohibition of a nonresident acting as administrator, letters of administration may issue to him, in a proper case, in the state of Nevada: *In re Bailey's Estate*, 31 Nev. 377, 103 Pac. 234. (See page 392.)

## 22. APPEAL.

On a contest between a widow and the son of a deceased person as to the right to act as administrator of his estate, in which the son bases his claim of prior right of administration upon an ante-nuptial agreement between the de-



ceased and the widow, wherein she relinquished her rights of succession in consideration of certain contracts to be performed by him, a decision of the district court of appeals, on a prior appeal, construing the ante-nuptial agreement, and holding that the widow might still claim her rights as heir, upon showing the failure of her husband to perform material covenants on his part, becomes the law of the case and binding on a subsequent appeal: *Estate of Warner*, 158 Cal. 441, 111 Pac. 352.

Where an appeal was taken from an order denying the appellant's motion for a new trial in the matter of his application for a letter of administration upon the estate of one Annie Nelson, the application was contested by C. O. Nelson and Annie Reardon, the matter was duly tried, findings made and filed, and the order denying said petition entered, the correct title to the cases would be: "In the Matter of the Estate of Annie Nelson, Deceased": *O'Brien v. Nelson*, 164 Cal. 573, 129 Pac. 985.

Upon appeal from an order granting letters of administration to one of two rival applicants, upon the hearing of which the appellant was nonsuited upon his opening statement, the order will not be reversed merely to allow the appellant to offer evidence not admissible to control the effect of the case made by the respondent, regardless of the question whether the granting of a nonsuit upon a contest for letters is proper or admissible practice or not. The case will be treated as if evidence had been offered and properly excluded: *Estate of McNeill*, 155 Cal. 333, 100 Pac. 1086.

Under the provisions of the statutes of the state of Wyoming an order of the probate court granting letters of administration is reviewable on a writ of error: *In re Barrett's Estate*, — Wyo. —, 141 Pac. 97.

A party has the same right to appeal from a judgment or final order of the district court in probate matters as in civil actions—that is by proceeding in error—unless as to a particular matter he is deprived of that right by some express provision of the statute: *In re Barrett's Estate*, — Wyo. —, 141 Pac. 97. (See page 393.)



## CHAPTER V.

## REVOCATION OF LETTERS, AND PROCEEDINGS THEREFOR.

1. Petition for revocation.
2. Province of court.
3. Statutory priority.
4. Appointment is valid until set aside.
5. What operates as a revocation.
6. Who may obtain.
7. Who can not obtain.
8. Letters may be revoked when.
9. Burden of proof.
10. Letters not to be revoked when.
11. Appeal.

**1. Petition for Revocation.** (See page 401.)

**2. Province of court.** (See page 401.)

**3. Statutory priority.** Section 1383 of the Code of Civil Procedure provides that when letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters and be entitled to the administration. This section, however, does not mean that an incompetent relative can nominate a competent one, and therefore, where the brother of deceased was incompetent under the provisions of section 1369 of the Code of Civil Procedure, because he was a nonresident, he could not authorize his son, although competent, to petition for a revocation of the letters issued to the son of a deceased brother of the decedent: *Estate of Martin*, 163 Cal. 803, 125 Pac. 1055. (See page 402.)

**4. Appointment is valid until set aside.** (See page 403.)

**5. What operates as a revocation.** (See page 403.)



## REFERENCES.

Revocation of letters of administration upon discovery of will, see note 49 L. R. A. (N. S.) 894.

**6. Who may obtain.** (See page 403.)

**7. Who can not obtain.** A petition for the revocation of the probate of an alleged invalid holographic will of a resident of the state of California and the admission to probate of a copy of an earlier will admitted to probate in a foreign jurisdiction is properly denied where the application is made by the assignee of a legatee under the latter will and no showing made by him of the execution of such will other than by a copy of the decree of the foreign court admitting it to probate: *Estate of Zollekofer*, 47 Cal. Dec. 234, 138 Pac. 995.

Primarily the right to letters of administration is vested in the widow or her fit and competent nominee. But where a widow waives such right in favor of her nominee such waiver is final and estops her from afterwards claiming to have the letters revoked and herself appointed unless her renunciation was obtained by fraud or misrepresentation: *In re Blackburn's Estate*, 48 Mont. 179, 137 Pac. 381. (See page 405.)

**8. Letters may be revoked when.** That the estate is of insignificant value is no ground for dispensing with the statutory requirement of a bond on issuing letters of administration in Nevada and letters so issued are void and should be revoked: *In re Bailey's Estate*, 31 Nev. 377, 103 Pac. 234.

Court could revoke letters for failure of administrator to obey order requiring him to give additional bond: *In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530. (See page 405.)

**9. Burden of proof.** (See page 406.)

**10. Letters not to be revoked when.** Although the provisions of section 1511 Code of Civil Procedure taken literally lend support to the decision of the trial court that it is mandatory upon it to revoke the letters testamentary of



an executor for failure to publish notice to creditors within two months, regardless of excuse, the more reasonable view is that the legislature intended to vest the trial judge with a wise discretion in the revocation of letters if it appears that the failure to publish notice is satisfactorily excused: *Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

Where a will has been proved and the executors have been removed for failure to publish notice to creditors within the required time, pending an appeal from the order removing them they are suspended from office until the final determination of the appeal: *Estate of Chadbourne*, 14 Cal. App. 481, 112 Pac. 472. (See page 406.)

**11. Appeal.** (See page 406.)



## CHAPTER VI.

BONDS OF EXECUTORS AND ADMINISTRATORS, AND  
LIABILITY THEREON.

1. Administration bonds.
  - (1) In general.
  - (2) May be required when. Effect of failure to give.
  - (3) Validity.
  - (4) Joint and several bond. Effect of.
  - (5) Additional bond. Further security.
2. Liability on administration bonds.
  - (1) In general.
  - (2) Sureties' liability attaches when.
  - (3) Conclusiveness upon sureties of accounting, distribution and judgment.
  - (4) Breach of bond.
  - (5) Sureties are liable for what.
  - (6) Liability of sureties for personal debts of executor or administrator.
  - (7) Sureties are not liable for what.
  - (8) Joint liability. Subrogation. Contribution. Reimbursement.
  - (9) Release. Termination of disability. Discharge. In general.
  - (10) What does not release sureties.
3. Action on bonds.
  - (1) In general.
  - (2) Successive administrations. Actions against sureties of defaulting administrators and deceased administrators or co-executors.
  - (3) Leave to sue.
  - (4) Restriction upon action against sureties.
  - (5) Parties.
  - (6) Pleadings.
  - (7) Defense. What is and what is not.
  - (8) Evidence.
  - (9) Judgment.
  - (10) Limitations of actions.
  - (11) Appeal.

## 1. ADMINISTRATION BONDS.

(1) In general. Where the authority of an executor is revoked and an administrator with the will annexed is



appointed, it is not essential to the validity of the bond to be given by him, as such, that his special character should be recited therein; a bond in the ordinary form required of general administrators by the statute is valid and proper: *Bull v. Bal*, 17 N. Mex. 466, 130 Pac. 251. (See page 434.)

**(2) May be exercised when. Effect of failure to give.** (See page 435.)

**(3) Validity.** (See page 435.)

**(4) Joint and several bond. Effect of.** (See page 436.)

**(5) Additional bond. Further security.** A special bond may be required in a proper case, it being for the court to determine to what extent additional security is necessary: *In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530.

Where on settlement of administrator's account additional security was found necessary, it could be required though appeal was pending from order settling account: *In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530.

Discretion of court is not disturbable except for abuse: *In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530. (See page 436.)

## **2. LIABILITY ON ADMINISTRATION BONDS.**

**(1) In general.** (See page 437.)

**(2) Sureties' liability attaches when.** Where the heirs to an estate had nothing to do with the procurement of sureties on the administrator's bond, they will not be charged with bad faith in failing to inform an additional surety of their suspicions of misconduct of the administrator, where their petition for his removal set forth his derelictions of duty as a matter of record, and the additional surety will be liable on the bond: *Elizalde v. Murphy*, 163 Cal. 681, 126 Pac. 978. (See page 439.)

**(3) Conclusiveness upon sureties of accounting, distribution and judgment.** (See page 439.)



**(4) Breach of bond.** (See page 440.)

**(5) Sureties are liable for what.** Where the bond executed by a surety of an administrator does not in terms limit his liability to the acts of the administrator after the execution of the instrument, but is general in terms, conditioned upon the faithful performance by the administrator of the duties of his trust, it is settled beyond controversy that, under such circumstances, the surety upon the bond of such administrator becomes liable for the breaches of trust of the administrator committed prior to his becoming such surety, as well as for those committed subsequent thereto: *Elizalde v. Murphy*, 163 Cal. 681, 126 Pac. 978, 981.

Where a special bond is given by an administrator to obtain an order to sell lands outside of the state and which order the court had no jurisdiction to make, the sale was made in his individual capacity, and the sureties on the bond are not liable to creditors of the estate as the proceeds of the sale of the lands are not available for payment of the debts of the estate: *People v. Parker*, 54 Colo. 604, 132 Pac. 57. (See page 440.)

**(6) Liability of sureties for personal debts of executor or administrator.** Inasmuch as an administrator who is chargeable with a debt due from himself can not sue himself to enforce the same, and yet it being his official duty to collect and pay the same for the estate, he must be held officially liable for any money he could have applied thereon at any time during his official term. If he has not so applied it when able to do so, he has not faithfully discharged his trust according to law, and he and the sureties on his official bond may be held liable for the payment of the same. It is only as he had the means to pay that he and his sureties are chargeable with the money which ought to be in his hands: *In re Loheide*, 17 Cal. App. 475, 120 Pac. 56. (See page 440.)

REFERENCES:

The matter of the liability of sureties on administration bonds in cases of judgments or decrees against their principal is discussed



in the case of *Commonwealth v. Fidelity & Deposit Co.*, 132 Am. St. 764.

As to liability of surety on bond of executor or administrator for debt contracted in interest of estate, see 22 L. R. A. (N. S.) 1094.

(7) **Sureties are not liable for what.** (See page 442.)

(8) **Joint liability. Subrogation. Contribution. Reimbursement.** (See page 443.)

(9) **Release. Termination of disability. Discharge. In general.** (See page 443.)

(10) **What does not release sureties.** (See page 444.)

### 3. ACTION ON BONDS.

(1) **In general.** Neither an administrator or the sureties on his bond may be sued for a breach of his administrator's bond until there has been a settlement or final accounting in the (probate) county court and a decree entered therein showing a balance due, or some other breach of the conditions of the bond, and a failure on the part of the administrator to comply with such decree: *Pennington v. Newman*, 36 Okla. 594, 129 Pac. 693. (See page 445.)

(2) **Successive administrations. Actions against sureties of defaulting administrators and deceased administrators or co-executors.** Where a fund subsequently claimed to be a trust fund came into the possession of a former administrator by virtue of his office, the sureties on his bond are liable to the estate after his death at suit of a succeeding administratrix, notwithstanding a suit to recover such fund from the estate was pending at his death: *Elizalde v. Murphy*, 11 Cal. App. 32, 103 Pac. 904. (See page 446.)

(3) **Leave to sue.** (See page 447.)

(4) **Restriction upon action against sureties.** An action upon the administrator's bond, in which it is sought to recover for alleged misconduct of, or appropriation of property by the administrator, will not lie until the remedies of



the probate court have been exhausted; in other words until the probate court has found such misconduct or appropriation to exist, and the administrator has refused or neglected to comply with the orders of the probate court made upon such findings: *Decker v. Decker*, 3 Alas. 123. (See page 447.)

- (5) **Parties.** (See page 448.)
- (6) **Pleadings.** (See page 448.)
- (7) **Defense. What is and what is not.** (See page 449.)
- (8) **Evidence.** (See page 450.)
- (9) **Judgment.** (See page 450.)
- (10) **Limitations of actions.** (See page 451.)
- (11) **Appeal.** (See page 452.)



## CHAPTER VII.

## SPECIAL ADMINISTRATORS.

1. Nature of duties.
2. Appointment.
  - (1) In general.
  - (2) Power to appoint.
  - (3) Appointment is unauthorized when.
  - (4) Presumption in favor of appointment.
  - (5) Right to object to appointment.
3. Powers of.
4. Accounting.
5. Reimbursement, compensation.
6. Actions by and against.
7. Appeal.
  - (1) Whether appeal lies.
  - (2) Presumption.
  - (3) Stay of proceedings.
  - (4) Considerations for appellate court.
  - (5) Affirming disallowance of claim paid.

## 1. NATURE OF DUTIES.

Sections 1421-22 Rem. & Bal. Code of the state of Washington cover only such debts and choses in action as may be assets of the estate. The only object of appointing a special administrator is to preserve the assets pending a formal administration and the matter of debts owing by the deceased is nowhere mentioned in the sections and it is not to be presumed that the legislature intended to leave the right to present a claim to a special administrator concealed in words of doubtful meaning: *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 396.

It being clear upon principle and authority that a special administrator has no power to pay claims against the estate, it follows that he has no authority to allow or reject them: *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 396. (See page 460.)



## 2. APPOINTMENT.

(1) **In general.** Failure of clerk to enter minutes as required by Code of Civil Procedure, Sec. 1412, held not fatal, appointment being complete when order was signed: *McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69.

In selecting a person to act as special administrator the court or judge is expressly required (Sec. 7472 Rev. Codes of Montana) to give preference to the person who is entitled to letters testamentary or of administration: *State v. District Court*, — Mont. —, 140 Pac. 733. (See page 461.)

(2) **Power to appoint.** The superior court having jurisdiction over the estate of a deceased person has power to appoint a special administrator in lieu of a regular administrator, upon the suggestion of disability of the latter, and to empower the special administrator to maintain and defend suits: *McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69. (See page 461.)

(3) **Appointment is unauthorized when.** (See page 462.)

(4) **Presumption in favor of appointment.** (See page 462.)

(5) **Right to object to appointment.** (See page 463.)

## 3. POWERS OF.

Section 1415 of the Code of Civil Procedure appears under any fair and reasonable construction to authorize the commencement and maintenance by the special administrator, when authorized by the order of court appointing him, of any suit or legal proceeding that might be commenced or maintained by the general administrator or executor: *Ruiz v. Santa Barbara Gas & Electric Co.*, 164 Cal. 188, 128 Pac. 330, 332.

If the special administrator is authorized to commence an action, the general administrator is entitled to be substituted as plaintiff. Section 1416 of the Code of Civil Procedure provides that the powers of the special administrator cease



upon the granting of letters testamentary or of administration, and that "the executor or administrator may prosecute to final judgment any suit commenced by the special administrator": *Ruiz v. Santa Barbara Gas & Electric Co.*, 164 Cal. 188, 128 Pac. 330, 331. (See page 464.)

4. ACCOUNTING. (See page 464.)

5. REIMBURSEMENT. COMPENSATION.

Where there has been a special administration of an estate, the special administrator is entitled to a compensation for which a reasonable sum must be fixed by the court under section 1417 of the Code of Civil Procedure, which section has no relation to the compensation fixed by sections 1618 and 1619 of the same code for a general administrator and his attorney: *Estate of Miller*, 15 Cal. App. 557, 115 Pac. 329. (See page 465.)

6. ACTIONS BY AND AGAINST.

Special administrators are included in Code of Civil Procedure, section 1582, authorizing actions against administrators to quiet title: *McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69. (See page 466.)

7. APPEAL.

- (1) Whether appeal lies. (See page 466.)
- (2) Presumption. (See page 466.)
- (3) Stay of proceedings. (See page 466.)
- (4) Consideration for appellate court. (See page 467.)
- (5) Affirming disallowance of claim paid. (See page 467.)



## CHAPTER VIII.

### WILL FOUND AFTER LETTERS OF ADMINISTRATION GRANTED AND MISCELLANEOUS PROVISIONS.

#### INCAPACITY OF REPRESENTATIVE TO ACT.

1. In general.
2. Administrator with will annexed.

1. In general. (See page 473.)

2. Administrator with the will annexed. (See page 474.)

#### REFERENCES.

Effect of insanity or mental incompetency of executor or administrator, see note 45 L. R. A. (N. S.) 1073.

## CHAPTER IX.

### DISQUALIFICATION OF JUDGE. TRANSFER OF PROCEEDINGS. JUDGE IS DISQUALIFIED WHEN.

Where the appointment of an administrator is not in favor of a creditor, and involves no interest or bias of the judge as a creditor, but is of a nominee of the widow under subdivision 1 of section 1365 of the Code of Civil Procedure, as to which the judge has no discretion to do otherwise than to make the appointment, the interest of the judge as a creditor, in such a case, should not disqualify him from making the appointment, nor render his general proceedings under such administration void: *Regents etc. v. Turner*, 159 Cal. 541, 114 Pac. 842. (See page 480.)



## CHAPTER X.

## REMOVAL. SUSPENSION. RESIGNATION.

1. In general.
2. Vacancy in administration.
3. Resignation.
4. Province of court.
5. Petition for removal.
6. Suspension.
7. What is cause for removal.
8. Removal of nonresident executors for absence.
9. What is no cause for removal.
10. Notice. Hearing. Evidence.
11. Order of removal, and its effect.
12. Appeal.

1. **In general.** The superior court, as a court of probate, has the supervision of the estates of deceased persons, and is vested with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the protection of the estate and that power is not to be interfered with by the appellate court, if it does not appear that its discretion has been abused; and where its findings and the evidence supporting the same appear to justify its action, this court will not review the same upon appeal: *In re Newell*, 18 Cal. App. 258, 122 Pac. 1099. (See page 489.)

2. **Vacancy in administration.** (See page 490.)

3. **Resignation.** Although the court has no power to appoint an administrator of the estate of a deceased person until a former administrator has been removed, or his resignation accepted, the statute (Code Civ. Proc., Sec. 1427) does not require that the resignation of a former administrator must have been accepted before the filing of the petition for the appointment of a successor. If it is necessary, under that section, that the estate be delivered up by the first administrator before a second can be appointed, it must be



presumed, from a record showing the appointment of the first administrator, his resignation and its acceptance, his final accounting and its settlement, and the appointment of his successor, that such delivery was made: *Barboza v. Pacific Portland Cement Co.*, 162 Cal. 36, 120 Pac. 767. (See page 491.)

**4. Province of court.** Where there is reasonable ground to believe that the acts of the administrator have been in violation of his trust the county court has full authority to remove him if he is negligent with his trust or neglects to file his semi-annual accounts: *In re S. Marks & Co.'s Estate*, 66 Or. 347, 133 Pac. 778. (See page 493.)

**5. Petition for removal.** (See page 493.)

**6. Suspension.** (See page 493.)

**7. What is cause for removal.** An executor should be removed under the terms of Sec. 1136, Code Civ. Proc., "when he has committed or is about to commit a fraud upon the estate." The act of the executor in allowing a false claim against the estate, with full knowledge of how the claim had originated and that he had himself created the same as a claim against the estate, for the purpose of reimbursing his sister-in-law for moneys which he himself had borrowed from her, constituted a fraud against the estate for which he was properly removed: *Estate of Newell*, 18 Cal. App. 258, 122 Pac. 1099.

Where a testatrix devised adjoining tracts of land in severalty to her two sons and also devised to them as joint owners a certain water right and water ditch used by her to convey water to such lands, which ditch terminated on the portion of the land given to one of the sons, with the request that they jointly use the same, the other son acquires the right to extend the water ditch from its terminus over the land devised to his brother to and for the benefit of his own land and the brother's land is created a servient tenement for that purpose: *Suloway v. Suloway*, 160 Cal. 508, 117 Pac. 522.



Before an order for the removal of an executor without letters testamentary would be authorized it would be necessary to find some trust created by the will has not been faithfully discharged and that the parties interested or some of them have been damaged or are about to be damaged by his acts: *In re Hooker's Estate*, 76 Wash. 72, 135 Pac. 817. (See page 492.)

Failure by an executor to file an inventory within one month from his appointment as required by law is sufficient grounds for his removal and an order of the county court in so removing him will not be reversed except for abuse of discretion: *In re Manser's Estate*, 60 Or. 240, 118 Pac. 1026.

Where it appears that an executor's interest conflicts with his duty as executor the county court is authorized to remove him: *In re Manser's Estate*, 60 Or. 240, 118 Pac. 1026.

Where there is evidence tending to show that charges against an administrator of misappropriation of the property of the estate may be true the court is justified in removing him without undertaking to determine the truth or falsity of the charges and under such circumstances some person should be in charge whose interest it will be to cause the alleged delinquencies to be thoroughly investigated: *Bean v. Pettengill*, 57 Or. 22, 109 Pac. 805.

An executor should be removed, under the terms of section 1136 of the Code of Civil Procedure, "when he has committed or is about to commit a fraud upon the estate." The act of the executor in allowing a false claim against the estate, with full knowledge of how the claim had originated, and that he had himself created the same as a claim against the estate, for the purpose of reimbursing his sister-in-law for moneys which he himself had borrowed from her, constituted a fraud against the estate for which he was properly removed: *In re Newell*, 18 Cal. App. 258, 122 Pac. 1099.

Neglect, embezzlement, or mismanagement, held ground for revocation of letters: *In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530. (See page 494.)



## REFERENCES.

As to what are grounds for the removal of executors and administrators, see note to *Pfefferle v. Herr*, 138 Am. St. 525-554.

**8. Removal of nonresident executors for absence.** (See page 496.)

**9. What is no cause for removal.** It is the duty of the executor to publish the notice as the law requires. He has no discretion in that regard; but if by excusable neglect he omits to do so, the burden is upon him to show such excusable neglect, and if such excuse appears and the estate has suffered no loss by reason thereof, the excuse should be accepted: *Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

Where it appears that the executor honestly endeavored to have the notice published, and requested his attorney to prepare and publish it, and the attorney delegated the work to his stenographer, who by oversight omitted to publish it in time, the oversight of the stenographer, though regrettable, is not of sufficient gravity to authorize the removal of the executor: *Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

Although the provisions of section 1511 of the Code of Civil Procedure, taken literally, lend support to the decision of the trial court that it is mandatory upon it to revoke the letters testamentary of an executor for failure to publish notice to creditors within two months, regardless of excuse, the more reasonable view is that the legislature intended to vest the trial judge with a wise discretion in the revocation of letters, and to confer upon him the power to decline to revoke the letters if it appears that the failure to publish the notice within the statutory period is satisfactorily excused: *Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

It should be and is the policy of the law to give effect, as far as it can be legally done, to the expressed will of the deceased. The nomination of the executor is evidence of the confidence reposed in him by the testator, and the



deliberate purpose and desire thus solemnly expressed as to the administration of the estate should not be thwarted unless the plain provisions of the law or the interests of justice demand it. The provisions of the will reposing special confidence in him should not be laid out of view where there may be a question as to what the legislature intended in a provision as to the removal of an executor; and it should rather incline the court to give to the law a construction as favorable as possible to the executor, where he has not shown himself to be incompetent, corrupt or grossly negligent: *Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

When the purpose of the law is apparent, it should be given effect, since whatever is within the purpose of the lawmaker is as much part of the statute as if it was within the letter. To carry out the purpose of the law it is held in many cases that the words "shall" and "must" may be considered directory merely: *Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

The forfeiture of an office is not favored, and provisions having that effect are to be strictly construed to avoid such forfeiture; and if the statute can be reasonably interpreted to avoid the forfeiture, it should be so construed: *Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

Evidence held not to justify revocation of letters for mismanagement: *In re Bottoms' Estate*, 156 Cal. 129, 103 Pac. 849. (See page 497.)

**10. Notice. Hearing. Evidence.** (See page 497.)

**11. Order of removal and its effect.** (See page 498.)

**12. Appeal.** Where the evidence is conflicting on an application for removal of an administrator, the matter being in the discretion of the probate court, its decision will not be disturbed on appeal: *Shore v. Wall*, 22 Colo. App. 146, 122 Pac. 1122.

It is held that under all circumstances appearing, the trial court was not justified in revoking the letters of the



executor for an honest mistake which was not the result of gross carelessness, and which was productive of no positive injury to the estate, and that the order must be reversed: Estate of Chadbourne, 15 Cal. App. 363, 114 Pac. 1012. (See page 499.)



# **PART V.**

## **INVENTORY AND COLLECTION OF EFFECTS OF DECEDENT.**

### **CHAPTER I.**

#### **INVENTORY, APPRAISEMENT AND POSSESSION OF ESTATE.**

**§ 357. Appraisement and pay of appraisers.**

**§ 377. Surviving heirs may collect money deposited in bank.**

#### **EFFECTS OF DECEDENTS. INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.**

##### **1. Effects of decedents.**

- (1) Administration in general.
- (2) Interference with estate. Irregular accounts.
- (3) What are assets. In general.
- (4) Same. Notwithstanding what.
- (5) Estoppel to deny.
- (6) What are not assets.
- (7) Discovery of assets.
- (8) Collection of assets.
- (9) Collection of, by domiciliary, ancillary, and foreign executor.
- (10) Custody and control of assets.
- (11) Widow takes as trustee when.
- (12) Realty. Personalty. Equitable conversion.
- (13) Remainder in fee after homestead.

##### **2. Inventory and appraisement.**

- (1) In general.
- (2) Affidavit.
- (3) Return.
- (4) Must include what.
- (5) Second or further inventory.
- (6) As evidence of value.
- (7) Appraisement.
- (8) No estoppel from filing inventory.
- (9) Correction, how made.

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**3. Possession of estate.**

- (1) Right to and nature of.
- (2) Statute of limitations, loss of right.
- (3) Domiciliary executors.
- (4) Recovery of possession.

**EFFECTS OF DECEDENTS. INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.**

**§ 357. Appraisement and pay of appraisers.** To make the appraisement, the court, or a judge thereof, must appoint three disinterested persons (any two of them may act), who are entitled to receive a reasonable compensation for their services, not to exceed \$5.00 per day, to be allowed by the court or judge; provided that where it appears by the affidavit of the administrator or executor that, in his judgment, the estate is worth less than one thousand five hundred dollars, the court may appoint one appraiser to make the appraisement of such estate. The appraisers or appraiser must, with the inventory, file a verified account of their or his services and disbursements. If any part of the estate is in any county than that in which letters issued, an appraiser or appraisers thereof may be appointed, either by the court or judge having jurisdiction of the estate, or by the court or judge of such other county, on request of the court or judge having jurisdiction. No clerk or deputy, nor any person related by consanguinity or affinity to or connected by marriage with, or being a partner or employee of the judge of the court, shall be appointed or shall be competent to act as appraiser in any estate, or matter or proceeding pending before such judge or in said court.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1868), § 1444.**

**§ 377. Surviving heirs may collect money deposited in bank.** When any deposit with a bank shall be made by or in the name of any married woman or minor, the same shall be held for the exclusive right and benefit of such depositor, and free from the control or lien of all other persons, except creditors, and shall be paid, together with the dividends, if any, and interest, if any, thereon to the person in whose



name deposits shall have been made, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge for such deposit, or any part thereof, to the bank. When any deposit with a bank shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to such bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest, if any, thereon, may be paid to the person for whom the deposit was made. When a deposit with a bank shall be made by any person in the names of such depositor and another person or persons, and in form to be paid to either or the survivor or survivors of them, such deposit thereupon, and any additions thereto made by either of such persons upon the making thereof, shall become the property of such person as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the lifetime of all or any or to the survivor or survivors after the death of one or more of them, and such payments and the receipt or acquittance of the one to whom such payment is made shall be valid and sufficient release and discharge to said bank for all payments made on account of such deposit. The surviving husband or wife or the guardian of the estate of any insane or incompetent husband or wife of any deceased person.—**Cal. Stats. and Amdts. 1913. Chap. 192, p. 335.**

### 1. EFFECTS OF DECEDENTS.

(1) **Administration in general.** (See page 517.)

(2) **Interference with estate. Irregular accounts.** (See page 518.)

(3) **What are assets. In general.** A retail liquor license is property which passes to personal representatives on the death of the holder as against third persons unlawfully converting the same to their own use: *Jaffe v. Pacific Brewing & Malting Co.*, 69 Wash. 308.



A right of action to recover damages for being put off a train is property for which letters of administration may be granted in the county in which an action for the recovery of such damages brought by him was pending at decedent's death even though he is a nonresident and leaves no other property in the state: *Forrester v. Southern Pacific Co.*, 36 Nev. 247, 134 Pac. 757.

Upon the death of the mortgagee, the mortgage with the indebtedness secured, like other choses in action, becomes a personal asset in the hands of his administrator: *Fehringer v. Martin*, 22 Colo. App. 634, 126 Pac. 1133. (See page 519.)

#### REFERENCES.

The subject of debts owing by executors or administrators to the estate is discussed in a note to the case of *Wachsmith v. Penn. Life Ins. Co.*, 132 Am. St. 230.

Effect of appointment of debtor as executor or administrator to discharge debt, or change personal representative and his sureties, see note 26 L. R. A. (N. S.) 411.

(4) **Same. Notwithstanding what.** (See page 520.)

(5) **Estoppel to deny.** (See page 521.)

(6) **What are not assets.** Under the amendment of 1907 to section 10 of the act creating the Veterans' Home a state institution, pension money in the possession of a member of the home at the time of his death and not disposed of by will is subject to the trust therein declared, and the board of directors of the home are entitled to retain the same as against the administrator of the estate of the deceased member, to be reclaimed by certain designated relatives within one year from death, otherwise to inure to the common benefit of the members of the home, subject to future reclamation by such relatives within five years: *Brownlee v. Veterans' Home*, 22 Cal. App. 207, 133 Pac. 1158.

Where an applicant for admission to the State Veterans' Home on March 20, 1903, was lawfully required to deposit all pension moneys with the state treasurer, and to agree to be governed not only by the laws of the state and the



rules of the board then existing, but also by all amendments to such laws and rules and he died subsequent to the amendment of March 16, 1907, and to an amended rule in pursuance thereof, requiring all pension moneys of a deceased member not disposed of by will to be distributed without probate, to a widow, minor children, or dependent mother or father, in the order named within five years, and if no such relative appears within that time the same shall escheat to the state, there can be no administration of pension moneys of a member dying intestate: *Treadway v. Board of Directors of Veterans' Home*, 14 Cal. App. 75, 111 Pac. 111.

Where the heirs of a deceased homestead entryman make final proof on the land originally entered by the decedent and procure title from the government whereby the land is conveyed "unto the heirs of" the decedent, the title vests directly in the parties who are the legal heirs of the deceased and does not inure to the benefit of the estate of the deceased and the probate court has no jurisdiction over such property and no power nor authority to order a sale thereof and the administrator of the estate of the deceased has no power nor authority to convey any title to such property: *Council Improvement Co. v. Draper*, 16 Ida. 541, 102 Pac. 7.

Property held by decedent in trust is not part of his estate and can not be administered as such: *Elizalde v. Murphy*, 11 Cal. App. 32, 103 Pac. 904.

It is duty of administrator to maintain right of estate to trust property until it has been judicially determined it does not belong to estate and to account for it to his successor: *Elizalde v. Murphy*, 11 Cal. App. 32, 103 Pac. 904.

That he is also individually liable to owner of fund held not to release him or his sureties from primary obligation incurred as administrator: *Elizalde v. Murphy*, 11 Cal. App. 32, 103 Pac. 904.

Executor held not to succeed to powers or duties of decedent as administratrix: *Sanford v. Bergin*, 156 Cal. 43, 103 Pac. 333. (See page 521.)



**(7) Discovery of assets.** (See page 523.)

**(8) Collection of assets.** In an action by an administrator to recover upon a note and to foreclose a mortgage belonging to the estate, the mortgagor can not defeat recovery on any of the following grounds: That the administrator was not related to or a creditor of the decedent and was appointed less than twenty days after the death, without citation to next of kin to appear and take or renounce administration; that the action was begun without an order of the court; that the money due on the note was not needed for the payment of debts and one of the heirs desired it to be set off to him by an order of distribution: *Ekblad v. Hanson*, 85 Kan. 541, 117 Pac. 1028.

An executor has the same right and power to bring an action to set aside a deed made by the testator in fraud of creditors as creditors would have had against the grantee and the testator in his lifetime: *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 738.

In an action by a surviving husband suing as the heir and administrator of the wife to recover land held by defendant under a deed from the wife, declarations made by the wife after the execution of the deed that she had given it and that her grantee owned the premises, were admissible as against her interest: *Allen v. Shires*, 47 Colo. 439, 107 Pac. 1072.

The omission of the word "as" in the title of an action by an administrator is cured by clear and distinct averments in the complaint showing that the action is not brought by the administrator in his individual capacity, but as the duly qualified and acting administrator of the estate to recover moneys claimed to belong to the estate, and alleged to have been demanded by him, "as such administrator," and to have been refused to be delivered to him "as such administrator": *Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261.

Although judgment was for the administrator and against the personal defendant, who claimed the legal right to the money, yet where the facts are undisputed, and the single



question presented upon appeal is as to their legal effect, and as to whether the findings of the undisputed facts warrant the conclusions of law and support the judgment, it is held otherwise, and that judgment should be ordered for defendant upon the findings: *Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261.

Where a debtor conveyed property in alleged fraud of creditors, creditors can not, after his death, bring an action to set aside the conveyance without first having applied to the court for an order directing the administrator to bring the action, as provided by sections 1589, 1590 of the Code of Civil Procedure: *Beswick v. Churchill*, 22 Cal. App. 404, 134 Pac. 722.

Administratrix, sole creditor, may sue to recover realty fraudulently conveyed by decedent, Code Civ. Proc., Sec. 1589, making it her duty to recover for benefit of creditors all such lands: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

Facts and circumstances held not to charge with laches administratrix suing to recover lands fraudulently transferred by decedent, for purpose of having it applied in satisfaction of her claim against estate of husband, it not appearing that any one was prejudiced by the delay: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

Approval of claim of representative by judge of superior court, as per Code Civ. Proc., Sec. 1510, takes place of allowance by administrator within Sec. 1589, requiring judgments or allowance of claims by representative, before latter can sue to recover property fraudulently conveyed by decedent: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

Evidence held to show fraudulent transfer: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

Evidence of voluntary transfer of all property before death held to sustain finding of insolvency: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.



Judgment in action by representative to recover land fraudulently transferred held erroneous in so far as it precluded defendants from retaining surplus after payment of debts, Code Civ. Proc., Sec. 1591, requiring payment of any surplus to person from whom property is recovered: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

As a general rule it is only the executor or administrator who can litigate for the recovery of the property of the estate. An exception, however, exists when the representative himself by collusion with the debtor or otherwise obstructs the course which the law establishes for the transmission of the estate to the heir. Under such circumstances the latter may join as defendants both the personal representative and the debtor: *Hillman v. Young*, 64 Or. 73, 129 Pac. 125. (See page 523.)

#### REFERENCES.

Relief from fraudulent conveyances after death of grantor is the subject of a note in 135 Am. St. 329.

(9) **Collection of, by domiciliary, ancillary, and foreign executor.** Where an administrator who is also sole heir at law removed property of the estate from another state to the state where the administration proceedings were pending and afterward an administrator was appointed in that other state who brought proceedings against the first administrator for a return of the property, held that the return ought to have been ordered on the ground of comity and justice as well as a proper regard for the rights of creditors in the sister state and the fact that the property had not been inventoried by the first administrator was no reason for refusing to order the return: *Moore v. Ingram*, 46 Colo. 204, 102 Pac. 1071.

Under section 100, Indian Territory Statutes 1899 (Sec. 43, Mansf. Dig. Ark.), an administrator de bonis non may proceed at law against his delinquent predecessor and his sureties, or either of them, to recover any part of the estate the preceding administrator may have in his possession: *Shipman v. Brown*, 36 Okla. 623, 130 Pac. 603.



Section 1667 of the Code of Civil Procedure, providing that where it is necessary in order that distribution may be made according to the will, the estate in this state should be delivered to the executor in the state of his residence, the court may order such delivery, is not a mandate upon the court but vests in it merely a discretion so to do: *Estate of Lathrop*, 165 Cal. 243, 131 Pac. 752. (See page 525.)

(10) **Custody and control of assets.** (See page 526.)

(11) **Widow takes as trustee when.** (See page 527.)

(12) **Realty. Personalty. Equitable conversion.** (See page 527.)

(13) **Remainder in fee after homestead.** (See page 527.)

## 2. INVENTORY AND APPRAISEMENT.

(1) **In general.** An administrator is required to make a true inventory of the estate and if he neglect or refuse to do so his letters may be revoked (Secs. 1450, 1457, Rem. & Bal. Code of Washington), and the court may take testimony as to the character of the property and the title thereto, not for the purpose of determining the title, which must be done in the appropriate manner provided by law, but for the purpose of determining whether the estate has a prima facie right to the property and that same should be included in the inventory: *Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 194. (See page 528.)

(2) **Affidavit.** (See page 529.)

(3) **Return.** (See page 530.)

(4) **Must include what.** Where the administrator of the estate of his deceased wife has received a sum of money which he claims to have received from the sale of his own property, and another claims to be a creditor of the deceased wife, and that the money received by the administrator accrued from the sale of her property, and that he is entitled to have the money applied to the payment of his debt. the administrator should be compelled to make an inventory of



such money received in his final account and settlement and may set up any claim he or any other person may have thereto: *Gille v. Emmons*, 91 Kan. 462, 138 Pac. 608.

It is not improper for the court to order property to be inventoried as community property, property which is claimed by the husband as his separate estate and to accept the husband's bond to cover the rents, issues, and profits: *Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 194. (See page 530.)

**(5) Second or further inventory.** A note given by the administrator to the decedent and which the former disputes should not be inventoried as part of the estate, but some discreet person should be appointed to sue on the note and if successful the judgment could then be inventoried as part of the estate: *Durst v. Haenni*, 23 Colo. App. 431, 130 Pac. 81.

An executor who claims to own in his individual right certain promissory notes payable to his own order but found among the effects of the testator, should not be compelled to make an unqualified return of such securities as the property of the estate, but the probate court should order the question of title to be properly brought before a court having jurisdiction to try same, which the probate court has not: *Hartwig v. Flynn*, 79 Kan. 595, 100 Pac. 642. (See page 530.)

**(6) As evidence of value.** The inventory is prima facie evidence of the extent and nature of the estate which has come to the administrator's hands, but he may, in proper cases, show that through inadvertency, ignorance, or mistake, property has been put into it which did not in fact belong there: *Pennington v. Newman*, 36 Okla. 594, 129 Pac. 693. (See page 530.)

**(7) Appraisement.** (See page 531.)

**(8) No estoppel from filing inventory.** (See page 531.)



(9) **Correction, how made.** As a general rule an inventory may not be impeached by a collateral attack. The proper method of correcting it is by motion, after notice, in the court where the administration is pending: *Pennington v. Newman*, 36 Okla. 594, 129 Pac. 693.

### 3. POSSESSION OF ESTATE.

(1) **Right to and nature of.** The possession of an administrator who was holding the land for residuary devisees as well as administrator could not become adverse as against the testator's daughter until the latter had notice that such residuary devisees were claiming to own the land absolutely: *Christianson v. Talmage*, — Or. —, 138 Pac. 453.

Representative takes possession of entire estate for administration purposes and all property is subject to debts without priority between realty and personalty: *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732.

An administrator is not entitled to possession of the property as against a tenant by the curtesy. The right to the possession against him can not be adjudicated until he has had his day in court upon an issue tendered against him by the administrator. Quaere whether the estate of the tenant by the courtesy is subject to the debts of the wife and therefore subject to possession by the representative of the estate: *Haberly v. Treadgold*, — Or. —, 136 Pac. 335. (See page 532.)

(2) **Statute of limitations, loss of right.** Where a testator was insane at the time of the performance of certain transactions complained of and remained so until the time of his death the statute of limitations does not run against him and his executors may have such transactions set aside: *Fleming v. Black Warrior Copper Co. Amalgamated*, — Ariz. —, 136 Pac. 136, 273.

A right of action existing in decedent at his death must be brought within a year from the death by his administrator under Comp. Laws 1907 of Utah, Sec. 2890: *Rasmussen v. Sevier Valley Co.*, 40 Utah 371, 121 Pac. 745.



A judgment against the administrator, in an action brought by him against the heirs to obtain possession of the land, rendered in accordance with the provisions of section 1452 of the Code of Civil Procedure, upon findings that possession by him was unnecessary to pay debts, expenses, or legacies, or for distribution, did not divest the administrator or the court of the power to sell the land, if such sale was for the best interest of the heirs: *Estate of Bazzuro*, 161 Cal. 72, 118 Pac. 434.

Section 1452 of the Code of Civil Procedure does not make possession of land by the administrator a necessary prerequisite to a sale by him: *Estate of Bazzuro*, 161 Cal. 72, 118 Pac. 434. (See page 533.)

**(3) Domiciliary executors.** (See page 534.)

**(4) Recovery of possession.** (See page 534.)



## CHAPTER II.

## EMBEZZLEMENT OF PROPERTY OF ESTATE.

1. Definition.
2. Construction and validity of statute.
3. Indictment. Petition.
4. Power of court.

1. **Definition.** (See page 542.)

2. **Construction and validity of statute.** (See page 542.)

3. **Indictment. Petition.** (See page 542.)

4. **Power of court.** Under sections 3632 and 3636 of the General Statutes of Kansas of 1909, the probate court has authority to examine for concealed or embezzled property belonging to an estate and enforce its return to the administrator or other proper custodian, and if the person so embezzling or concealing such property refuse to comply with the order to restore the same, he may be imprisoned as for contempt of court and when so imprisoned he will not be discharged by a writ of habeas corpus: *Ex parte Moran*, 83 Kan. 615, 112 Pac. 94.

The district court upon an appeal from the probate court in proceedings under the Executor's Act found the defendant guilty of unlawfully taking away and withholding personal property of the estate from the administrator and adjudged that it be restored to his possession and that such restoration be compelled by attachment; but also ordered that in case there were sufficient other personal property of the estate to pay the indebtedness and expenses of administration, the administrator should return the property (or the proceeds thereof) to the defendants. Held that the order for the return of the property was an unwarranted interference with the due course of administration and erroneous: *Vaughan v. Brown*, 81 Kan. 1, 105 Pac. 30. (See page 543.)







# **PART VI.**

## **SUPPORT OF FAMILY. EXEMPT PROPERTY. HOMESTEAD.**

### **CHAPTER I.**

#### **SUPPORT OF FAMILY. EXEMPT PROPERTY.**

- § 388.** All property exempt from execution to be set apart for use of family.
- § 388a.** Petition to set aside exempt property. Notice of hearing, how served and when.
- § 402.** Administration when estate does not exceed \$1500.

#### **FAMILY ALLOWANCE.**

- 1. In general. Exempt property.**
  - (1) Widow's quarantine.
  - (2) Exempt property.
  - (3) Same. Homestead.
  - (4) Paramount nature of right.
  - (5) Application or petition. "Family."
  - (6) Proof of right.
  - (7) Notice not required.
  - (8) Considerations in fixing.
  - (9) Objections. Exceptions.
  - (10) Fixing amount. When not excessive.
  - (11) To be made when.
  - (12) Widow is entitled to, when.
  - (13) Widow is not entitled to, when.
  - (14) To children.
  - (15) Order. In general.
  - (16) Order. Duration, modification, cessation, and suspension.
  - (17) Order. Validity.
  - (18) Order. Finality, conclusiveness.
  - (19) Paid without order of court.
  - (20) Contest of allowance. Collateral attack.
  - (21) Vacating allowance. Fraud.
  - (22) Liens. Contracts to pay out.



- (23) Further allowance.
  - (24) Motion for new trial.
  - (25) Appeal. Review.
2. Assignment of estate less in value than fifteen hundred dollars.
- (1) In general.
  - (2) Notice to creditors, and to show cause.
  - (3) What property may be set apart.
  - (4) Apportionment and rights of children.
  - (5) Liens, outstanding titles, etc.
  - (6) Appeal.
  - (7) Death pending appeal. Abatement.

#### SUPPORT OF FAMILY. EXEMPT PROPERTY.

**§ 388. All property exempt from execution to be set apart for use of family.** Upon the return of the inventory, or at any subsequent time during the administration, the court may on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded; provided such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided in article two of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1874), § 1465.**

**§ 388a. Petition to set aside exempt property. Notice of hearing, how served and when.** When the petition mentioned in the preceding section is filed the clerk of the court must set the petition for hearing by the court and give notice thereof by causing notices to be posted in at least



three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the petitioner, the nature of the application and the time at which the same will be heard. Such notice must be given at least ten days before the hearing, and a copy thereof must be mailed at least ten days before the day appointed for the hearing to the executor or administrator, if he be not the petitioner, and to any person named as co-executor or co-administrator not petitioning, addressed to them at their places of residence, if known, and if not known, then to the county seat of the county where the proceedings are pending. Proof of such posting and mailing must be made at the hearing.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1875), § 1465a.**

**§ 402. Administration of estates not exceeding fifteen hundred dollars in value.** If a deceased person leave a widow or minor child or minor children and upon the return of the inventory of the estate of such deceased person it shall appear to the court or a judge thereof by the verified petition of the personal representative of such deceased person or of his widow or of his minor children or child or of the guardian of such minor children or any of them that the net value of the whole estate of said deceased over and above all liens or encumbrances of record at the date of the death of said deceased does not exceed the sum of fifteen hundred dollars, the court, or a judge thereof shall, by order, require all persons interested to appear on a day fixed to show cause why the whole of said estate should not be assigned for the use and support of the family of the deceased. Notice thereof shall be given and proceedings had in the same manner as provided in Secs. 1633, 1635 and 1638 of this code. If, upon the hearing, the court finds that the net value of the estate over and above all liens or encumbrances of record at the date of death of said deceased does not exceed the sum of fifteen hundred dollars, it shall, by decree for that purpose, assign to the widow of the deceased, if there be a widow, or if there be no widow, then to the minor children of the deceased, if there be minor children, the whole of the estate, subject to whatever mortgages, liens,



or encumbrances there may be upon said estate at the time of the death of the deceased, after the payment of the expenses of the last illness of the deceased, funeral charges, and expenses of administration, and the title thereof shall vest absolutely in such widow, if there is a widow, or if there is no widow, in the minor children or child, subject to whatever mortgages, liens or encumbrances there may be upon said estate at the time of the death of the deceased, and there must be no further proceedings in the administration, unless further estate be discovered.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1876), § 1469.**

#### FAMILY ALLOWANCE.

##### 1. IN GENERAL. EXEMPT PROPERTY.

(1) **Widow's quarantine.** (See page 563.)

(2) **Exempt property.** (See page 564.)

(3) **Same. Homestead.** (See page 565.)

(4) **Paramount nature of right.** An order granting a family allowance made after the filing of the inventory, which has become final, is conclusive in favor of the right of the widow to receive the amount directed to be paid to her, so long as the order remains in force and the fact that upon proceedings for partial distribution almost all of the estate had been set over to the persons entitled thereto and that the widow had come into possession of practically her whole share of the estate and that she had acquiesced in the discontinuance of the payment of the allowance for more than two and a half years, does not affect her right to claim such allowance: *Estate of Nelson*, 47 Cal. Dec. 321, 139 Pac. 692.

The widow's allowance is a claim against the estate for support pending administration and is no more waived by a provision contained in an ante-nuptial agreement than any other just claim against the estate would be: *Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 70.



An allowance to a widow is a preferred claim against an estate. It is no part of her distributive share of the estate, but is rather a charge or claim against the estate. It is in fact nothing more nor less than a part of the costs of administration: *Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 70.

The provision made by a testator for the support and maintenance of his widow can not be used or diverted to uses or purposes wholly foreign to her maintenance or personal expenses: *Blair v. Blair*, 82 Kan. 464, 108 Pac. 827.

Where it is provided in the will that the widow may draw from the estate all the money required for her support and maintenance, the word "require" will not be interpreted to mean an amount needed or necessary for such purpose, but it will be held to include such sum or sums as she may request or wish to use for such purpose: *Blair v. Blair*, 82 Kan. 464, 108 Pac. 827.

Even if the estate be insolvent, the family is entitled to such "reasonable allowance out of the estate as shall be necessary for" their maintenance "according to their circumstances," during the whole of the year prescribed, if the estate is properly in progress of settlement so long, and the court may not restrict such "reasonable allowance" to a specified part of such year. The determination of the time during which a "reasonable allowance" shall be paid does not rest in the sound discretion of the court: *Estate of Treat*, 162 Cal. 250, 121 Pac. 1003.

A finding and adjudication of the question of the solvency or insolvency of the estate is not implied from the mere making of an order for family allowance, within a year after the granting of letters, at least in the case of an order which does not in express terms prescribe the period during which the allowance shall continue: *Estate of Treat*, 162 Cal. 250, 121 Pac. 1003.

While, as a prerequisite to an order for family allowance under section 1466 of the Code of Civil Procedure, certain facts must be determined by the trial court, there is nothing in the statute requiring the question of solvency or insol-



vency of the estate to be so determined: *Estate of Treat*, 162 Cal. 250, 121 Pac. 1003. (See page 566.)

(5) **Application or petition.** “**Family.**” (See page 568.)

(6) **Proof of right.** (See page 569.)

(7) **Notice not required.** (See page 569.)

(8) **Considerations in fixing.** Where a wife who had been living apart from her husband under articles of separation applies for a family allowance and had knowledge of fraudulent acts of her husband which would nullify the effect of such separation articles as a bar to her receiving such allowance, it was incumbent upon her to have pleaded the fraud. In the absence of such pleading the rights of the parties must be adjudicated in accordance with the articles of separation: *Estate of Yoell*, 164 Cal. 540, 129 Pac. 999.

Where the personal property ordered to be set aside for the use of the widow and children, or either, is insufficient for their support, and if there be other estate the court may make a reasonable allowance thereout for the maintenance of the family, under Secs. 5265-6 of the Comp. Laws of Oklahoma 1909: *Hale v. Hale*, — Okla. —, 135 Pac. 1145. (See page 570.)

(9) **Objections. Exceptions.** (See page 570.)

(10) **Fixing amount. When not excessive.** Much is left to the discretion of the judge in determining the amount of the family allowance under section 1464, Cal. Code Civ. Proc., until the return of the inventory, and his action will not be disturbed on appeal unless it clearly appears that it has been improperly exercised: *Estate of Cowell*, 164 Cal. 636, 130 Pac. 209.

In the determination of the question as to the amount of the preliminary allowance to the widow of a deceased person, much is necessarily left to the discretion of the judge to whom the application is made, and his action will not be disturbed on appeal, unless it clearly appears that the dis-



cretion has been improperly exercised: *In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209.

The fact that a widow has property of her own, or other means of subsistence, in no way affects her right to a preliminary allowance from the estate of her deceased husband as is reasonably necessary for her support. The statute gives her this right to be so supported by the estate, regardless of her own means. (See *Estate of Lux*, 100 Cal. 604, 605, 35 Pac. 341; *Estate of Bump*, 152 Cal. 276, 92 Pac. 643). And it also appears to be settled in this state, even as to an allowance made under section 1466, Code of Civil Procedure, after the return of the inventory, that the fact that the widow is given property by the will of her husband in no way affects her right to be given, by way of allowance for support, such sum as is reasonably necessary therefor, leaving the property given her by the will, whether distributed pending the administration, or at the close of it, to go to the widow intact, and undiminished by any charge for expense of administration or support of family: *In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209. (See page 571.)

**(11) To be made when.** The preliminary or temporary allowance, required to be made for the widow or minor children by section 1464, Code of Civil Procedure, terminates upon the return of the inventory (*Crew v. Pratt*, 119 Cal. 137, 51 Pac. 44; *Estate of Bell*, 142 Cal. 100, 75 Pac. 679), when the court may make an order for such allowance as may be necessary during the further progress of the settlement of the estate. (See Code Civ. Proc., Sec. 1466): *In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209. (See page 571.)

**(12) Widow is entitled to, when.** An order granting a family allowance, made after the filing of the inventory, which has become final by the lapse of the time within which an appeal might have been taken therefrom, is conclusive in favor of the right of the widow to receive the amount directed to be paid to her, so long as the order remains in force, and the fact that upon proceedings for partial distribution almost all of the estate has been set over to the persons entitled thereto, and that the widow has come into



possession of practically her whole share of the estate, and that she has acquiesced in the discontinuance of the payment of the allowance after such partial distribution for more than two and a half years, does not affect her right to claim such allowance: *Estate of Nelson*, 47 Cal. Dec. 321, 139 Pac. 692. (See page 572.)

#### REFERENCES.

Widow's right to year's support or allowance out of insurance money, see note 46 L. R. A. (N. S.) 788.

Widow's right to year's support or allowance out of fund recovered for the negligent killing of husband, see note 42 L. R. A. (N. S.) 725.

**(13) Widow is not entitled to, when.** Where there are no minor children, then the family allowance is for the widow alone, and "the rule seems to be that a widow may by appropriate and sweeping provisions of an ante-nuptial contract (and so of course of a post-nuptial contract) waive her right to an allowance when the rights of minor children are not involved": *In re Yoell's Estate*, 164 Cal. 540, 129 Pac. 999. (See page 573.)

**(14) To children.** Though application for family allowance for infant beneficiaries of estate may be made without appointment of guardians ad litem, such guardian may be appointed, under Code Civ. Proc., Sec. 372, as in an "action" or "proceeding": *In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446.

Allowance to minor children before setting apart exempt property and homestead is not premature: *In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446. (See page 574.)

**(15) Order. In general.** (See page 576.)

**(16) Order. Duration, modification, cessation, and suspension.** Where the estate is insolvent the family allowance under section 1466, Cal. Code Civ. Proc., must not be for longer than one year after the granting of letters: *Estate of Treat*, 162 Cal. 250, 121 Pac. 1003.



The court may, where there has been a change in the circumstances of the estate, or in the relation of the parties, modify an order for family allowance in accordance with the altered conditions, but until such modification has been made, the order retains its force as a judgment: *Estate of Nelson*, 47 Cal. Dec. 321, 139 Pac. 692.

Mere delay in demanding the accumulated allowance does not forfeit the right thereto: *Estate of Nelson*, 47 Cal. Dec. 321, 139 Pac. 692.

It is not an abuse of discretion under such circumstances to reduce the allowance for the remaining period of administration: *Estate of Nelson*, 47 Cal. Dec. 321, 139 Pac. 692.

Where court retained its power over order for widow's allowance by provision "until further order of court," it was within its power and duty on proper showing to reduce or discontinue allowance: *In re Overton's Estate*, 13 Cal. App. 117, 108 Pac. 1021.

Questions as to poverty of mother having custody of children held immaterial from standpoint of executrix seeking to reduce allowance made, tending more to justify increase: *In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446.

Whether or not the estate is insolvent is a question of fact that may be determined, upon an opposition by creditors of the decedent, in a proceeding to enforce the continued payment of the allowance, instituted after the expiration of a year from the granting of letters. Such a proceeding involves no collateral attack upon the original order, but simply an inquiry as to whether the order had, by its terms, ceased to be operative: *Estate of Treat*, 162 Cal. 250, 121 Pac. 1003.

Under section 1466 of the Code of Civil Procedure, a family allowance, in the case of an insolvent estate, must not be for longer than one year after the granting of letters testamentary or of administration: *Estate of Treat*, 162 Cal. 250, 121 Pac. 1003.



An order for a family allowance which, in form, simply grants an allowance of a certain sum per month, without any specification of the time during which it shall continue, should be construed as if the provisions of that section as to the time during which it should continue constituted a part of the order. So construed, such an order continues during the progress of the settlement of the estate, unless the estate is insolvent, in which event it continues for only one year after the granting of letters, even though the settlement of the estate has not then been concluded: *Estate of Treat*, 162 Cal. 250, 121 Pac. 1003. (See page 576.)

- (17) **Order. Validity.** (See page 578.)
- (18) **Order. Finality, conclusiveness.** (See page 578.)
- (19) **Paid without order of court.** (See page 578.)
- (20) **Contest of allowance. Collateral attack.** (See page 579.)
- (21) **Vacating allowance. Fraud.** (See page 579.)
- (22) **Liens. Contracts to pay out.** (See page 580.)
- (23) **Further allowance.** (See page 581.)
- (24) **Motion for new trial.** (See page 581.)
- (25) **Appeal. Review.** An executrix is technically a party aggrieved by an order granting a family allowance, and as such has a right to maintain an appeal therefrom: *Estate of Snowball*, 156 Cal. 235, 104 Pac. 446.

Under subdivision 3 of section 963 of the Code of Civil Procedure, an appeal is allowed only from an original order granting or refusing to grant a family allowance and an order discontinuing a family allowance granted "until further order of the court" upon the petition of the heirs and devisees under the will of the deceased is not appealable: *Estate of Overton*, 13 Cal. App. 117, 108 Pac. 1021.

Under section 963, subdivision 3 of the Code of Civil Procedure, allowing an appeal in probate proceedings from an



order “against or in favor of . . . making an allowance for a widow or child,” opposing creditors and the administrator of an insolvent estate may appeal from an order directing the payment of a family allowance under such original order therefor, for a period subsequent to one year after the granting of letters: *Estate of Treat*, 162 Cal. 250, 121 Pac. 1003. (See page 582.)

## 2. ASSIGNMENT OF ESTATE LESS IN VALUE THAN FIFTEEN HUNDRED DOLLARS.

(1) **In general.** Upon an application by a widow to have the estate of her husband set aside to her as not exceeding \$1500 in value, the ultimate fact for the court to determine is the value of the estate; and if heirs of the husband contest her application on the ground that the husband and wife were tenants in common in certain property which has not been appraised, and that the estate is of greater value than \$1500, but the court finds the value to be less than \$1500 and sets aside the entire estate to the widow, its order will not be disturbed, upon appeal taken upon the judgment roll alone, for failure to find as to the alleged tenancy in common: *Estate of Shirey*, 47 Cal. Dec. 223, 138 Pac. 994.

The findings in such case must be presumed to speak the truth, and the insufficiency of the evidence to support them may not be reviewed in the absence of a bill of exceptions: *Estate of Shirey*, 47 Cal. Dec. 223, 138 Pac. 994.

Omitting to find on any issue in such case will be presumed, in the absence of a contrary showing, to result from the failure to offer any evidence in support of such issue: *Estate of Shirey*, 47 Cal. Dec. 223, 138 Pac. 994.

The presumption declared by section 164 of the Civil Code that a conveyance to a husband and wife creates a tenancy in common is not conclusive in favor of such contestants. It is therefore competent for the widow to testify that such property is community and that she declared a homestead thereon: *Estate of Shirey*, 47 Cal. Dec. 223, 138 Pac. 994.



The fact that a wife voluntarily left her husband within one week after their marriage and about two years prior to his death, without any agreement as to property rights, and during such interval had no communication with him, if it did not constitute an abandonment of him, at least relieved him from liability for her support. Under such circumstances she was not a member of his family at the time of his death, and was not entitled under section 1469 of the Code of Civil Procedure to have his estate of less value than \$1500 set aside to her: *Estate of Bose*, 158 Cal. 428, 111 Pac. 258.

Where the owner of an estate situated in Indian Territory, of less value in the aggregate than \$300, died in Indian Territory prior to statehood, an order of the United States court, exercising its probate jurisdiction, vesting the entire estate in the widow of deceased, was valid, and passed and vested in the widow all of such estate both real and personal. under section 3, chapter 1 of Mansfield's Digest of the Law of Arkansas: *Perryman v. Woodward*, 37 Okla. 792, 133 Pac. 244.

Where the whole estate was set aside to the widow on the ground that it was of less value than \$1000, under section 1464, Rem. & Bal. Code of the state of Washington, there is no limitation upon the widow's right to sell the same as she pleases: *Scott v. Watson*, — Wash. —, 135 Pac. 645. (See page 584.)

(2) **Notice to creditors and to show cause.** (See page 584.)

(3) **What property may be set apart.** (See page 584.)

(4) **Apportionment and rights of children.** (See page 585.)

(5) **Liens, outstanding titles, etc.** (See page 585.)

(6) **Appeal.** (See page 586.)

(7) **Death pending appeal. Abatement.** (See page 586.)



**CHAPTER II.**

**HOMESTEADS.**

**§ 411. Rights of survivor to homestead.**

**HOMESTEADS.**

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29. Appeal.

## HOMESTEADS.

**§ 411. Rights of survivor to homestead.** If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both are living, was selected from the community property, or from the separate property of the persons selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected



from the separate property of either the husband or wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, or devisees, subject to the power of the superior court to assign it for a limited period to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1877), § 1474.**

## I. ANTEMORTEM HOMESTEADS.

### 1. IN GENERAL.

Where land is held in cotenancy by a husband and his wife, he holding an undivided half interest as community property, and she the other half as her separate property, and both being in actual occupation thereof, neither he nor she jointly or severally could make, in the lifetime of the husband, a valid declaration of homestead upon his undivided interest in the cotenancy property, so as to affect that interest alone with the homestead characteristics, separate and distinct from the undivided interest of the wife therein: *Estate of Davidson*, 159 Cal. 98, 115 Pac. 49.

The primary purpose of the homestead right is to preserve a home for the protection of the family: *Hannon v. Southern Pacific Ry. Co.*, 12 Cal. App. 350, 107 Pac. 335.

The right to the homestead is purely the creation of statute, and such right may be modified at the will of the legislature: *Hannon v. Southern Pacific Ry. Co.*, 12 Cal. App. 350, 107 Pac. 335.

Const., Art. 17, Sec. 1, does not forbid legislature from extending homestead privilege to persons other than heads of families: *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266.

Homestead and exemption laws are in subservience to the interest that the public has in the maintenance and protec-



tion of the home of the individual citizen: *Wentworth v. McDonald*, — Wash. —, 129 Pac. 504.

Under the laws of Oklahoma the homestead of a family may consist of more than one tract of land, and may be owned by either the husband or the wife, or by both jointly, or one tract may be owned by one and the other tract owned by the other, so long as the aggregate number of acres occupied as a home does not exceed 160: *Gooch v. Gooch*, 38 Okla. 300, 133 Pac. 242.

One who holds possession of land under an executory contract of purchase may declare a valid homestead therein: *Brooks v. Black*, 22 Colo. App. 49, 123 Pac. 133.

Homesteads being unknown at common law, exist only by statutory or constitutional provisions. (a) In the absence of some statutory provision limiting the right to incumber the homestead, he may sell or incumber the same without the joinder or consent of his spouse, and such alienation or incumbrance made without her consent is valid and binding: *Maloy v. Wm. Cameron Co.*, 29 Okla. 763, 119 Pac. 587.

The right of homestead did not exist at common law and is one of statutory origin: *In re Cook's estate*, 34 Nev. 217, 117 Pac. 29.

The rule of liberal construction is extended to homestead laws, and in every permissible case where there is a bona fide home of the parties, it should be held that the business conducted within the premises is not the paramount and principal purpose, but the incidental and subordinate purpose; that the home is the main thing and not the business; that the business is conducted to enable the parties to maintain the home, and not that the parties are incidentally inhabiting the premises for the purpose of maintaining the business: *McKay v. Gesford*, 163 Cal. 243, 124 Pac. 1016.

After a homestead had been declared by a husband and wife, they thereby acquired a common interest in the property, which was, during the life of both, somewhat akin to a joint tenancy; and after such declaration the homestead could not be conveyed or encumbered except by an instru-



ment executed and acknowledged by both of them: *Cordano v. Wright*, 159 Cal. 610, 115 Pac. 227.

Where a homestead was declared on certain described property, together with the water rights appurtenant thereto, consisting of shares of stock in a water company, it was held that not only the property itself, but also the stock and the water represented thereby, became impressed with the homestead: *Swan v. Walden*, 19 Cal. App. 128, 124 Pac. 857.

The homestead is something distinct from the legal title. It qualifies and limits the right of the owner of the title for the benefit and protection of both spouses while living, and to insure future protection to the survivor: *Wall v. Brown*, 162 Cal. 307, 122 Pac. 478.

The rule that a homestead can not be selected or claimed on lands owned by the claimant as tenant in common or joint tenant does not apply where the joint or common tenancy is that of husband and wife: *Sewell v. Price*, 164 Cal. 265, 128 Pac. 407, 409.

Hotel property may be properly claimed as homestead: *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266.

Land held by husband and wife may be impressed with homestead at instance of wife: *Swan v. Walden*, 156 Cal. 195, 103 Pac. 931.

Deed of husband alone, made after declaration of such homestead, held void: *Swan v. Walden*, 156 Cal. 195, 103 Pac. 931.

Wife may select property to value of \$5000, under Civil Code, Secs. 1260, 1263: *MacLeod v. Moran*, 11 Cal. App. 622, 105 Pac. 932.

The homestead of a family, whether title to the same shall be lodged in or owned by the husband or wife shall be reserved to every family in the state of Oklahoma, exempt from attachment or execution, and every other species of forced sale for the payment of debts: *Alton Mercantile Co. v. Spindel*, — Okla. —, 140 Pac. 1168. (See page 595.)



## REFERENCES.

As to the general policy of the Homestead Law, see note to the case of *Mailhot v. Turner*, 133 Am. St. 336.

## 2. DEFINITION OF "HOMESTEAD."

The statute of the state of Washington (Rem. & Bal. Code, Sec. 528) defines a homestead as the dwelling house in which the claimant resides and the land on which it is situated, selected under the provisions of the Homestead Law, Sec. 529 exempting homesteads not exceeding \$1000 in value, selected at any time before sale. Section 552 permits homesteads to be selected on land, and provides that the premises must be maintained and actually used for a homestead by the claimant, and section 559 requires the declaration to contain a statement showing that it is made by the head of a family or, when made by a wife, that her husband has not made such declaration, and that she makes the declaration for their joint benefit; a statement of residence on goes only to the manner and not to the time of selection, and hence when the homestead is once jointly selected, they do not control section 535, allowing an abandonment only by declaration thereof, so that a removal without such declaration does not destroy the exemptive character of a homestead: *Wentworth v. McDonald*, — Wash. —, 129 Pac. 504.

The purpose of a homestead is to secure a home to each and all those clothed with a homestead right—to each and all of them; and the power of a stranger to enter into possession of the land, and, as a tenant in common to interfere with its occupancy and control by the homestead claimants and have it partitioned, or sold, if division be impracticable, would be inconsistent with the very nature of a homestead and violative of the very purpose for which a homestead is created: *Mills v. Stump*, 20 Cal. App. 84, 128 Pac. 349, 350.

The homestead interest in land is the offspring of statute, created for the humane and benevolent purpose of furnishing what its designation indicates—a home for the persons for whom the law awards it; and in its enjoyment it is by



law made a sanctuary against execution creditors, and should be against every other form of hostile attack: *Mills v. Stump*, 20 Cal. App. 84, 128 Pac. 349, 350.

A homestead under the laws of Wyoming consists of a house and lot or lots in any town or city, or of a farm consisting of any number of acres not exceeding 160 acres, so that the value does not exceed \$1500: *Jones v. Losekamp*, 19 Wyo. 83, 114 Pac. 676.

Where the premises in Wyoming occupied as a homestead are of greater value than \$1500, the homestead consists of such portion of the premises including the dwelling house, as amounts in value to the sum of \$1500: *Jones v. Losekamp*, 19 Wyo. 83, 114 Pac. 676.

The term "homestead" is not a designation of a particular estate, implying some prohibitions and limitations not incident to ordinary titles; but the term only means "the home place," or "the house and adjoining grounds where the head of the family dwells": *Mansfield v. Hill*, 56 Or. 400, 108 Pac. 1008.

Under the laws of the state of Washington the homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated selected as provided by law, which provision is that homesteads may be selected and claimed in lands and tenements with the improvements thereon not exceeding in value the sum of \$2000. The premises thus included in the homestead must be actually intended and used for a home for the claimants and shall not be devoted exclusively to any other purpose. A dwelling house built on one lot and a garden on another separated from the first by an alley way together constituted a homestead within the law: *Morse v. Morris*, 57 Wash. 43, 106 Pac. 469, 135 Am. St. 968.

Under the laws of the state of Washington a homestead can be selected only by the execution and filing of a homestead declaration and the premises constitute a homestead only from and after the time the declaration is filed for record. No homestead right can be acquired by occupancy only: *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 154.

Probate Sup. 12.



Under Sec. 1, Art. 12, of the constitution of the state of Oklahoma, and Sec. 3246 Comp. Laws 1909, the homestead of a family, not in a city, town, or village, may consist of 160 acres of land and may be owned by either husband or wife, or by both jointly: *Alton Mercantile Co. v. Spindel*, — Okla. —, 140 Pac. 1168. (See page 596.)

### 3. APPLICATION OF STATUTE.

Under the rule of liberal construction applicable to homestead laws, in every permissible case where the premises are the bona fide home of the parties, it should be held that the business conducted within the premises is the incidental and not the paramount purpose, and is conducted for the paramount purpose of enabling the parties to maintain a home: *McKay v. Gesford*, 163 Cal. 243, 124 Pac. 1016.

It is not a new or additional title to the land but merely the establishment of certain privileges or immunities therein: *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689. (See page 596.)

### REFERENCES.

As to construction of federal statute exempting land acquired as a homestead from liability for debts contracted prior to issuance of patent, see note *Ann. Cas.* 1912D 382.

### 4. SURVIVORSHIP.

Upon the death of either spouse, the decedent's homestead rights inure to the survivor: *Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335; *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312.

The devolution of a homestead by the death of a spouse, under section 1474 of the Code of Civil Procedure, can only apply when the relation of spouse exists at the date of the death, and can not apply when the relation of spouses has been severed by divorce, and the death of a divorced husband can confer no right of devolution upon the divorced wife under that section of the code: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.



The word "survivor," as used in section 1174 of the Civil Code, refers only to the surviving spouse, and not merely the surviving individual whose character as a spouse has been destroyed by a decree of divorce, during the life of the former husband now deceased: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

The words "husband and wife," as applied to domestic relations, each has but one meaning, viz., "a man who has a wife" and a "woman who has a husband," and can not mean an unmarried man and an unmarried woman, or a divorced man and a divorced woman: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

Under section 1474 of the Code of Civil Procedure and section 1265 of the Civil Code, the right to have property upon which a homestead has been impressed vest absolutely in the surviving spouse depends upon the character of the property at the time the homestead upon it is selected. If the homestead was selected from the community property or from the separate property of the person selecting or joining in the selection of the same, it vests absolutely in the survivor. It vests otherwise, if selected under certain conditions, from the separate property of either spouse: *Wall v. Brown*, 162 Cal. 307, 122 Pac. 478. (See page 598.)

Upon the death of either spouse, the decedent's homestead rights inure to the survivor: *Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335; *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312.

## 5. LAW AT DEATH CONTROLS.

The law in force at the time of the death of one of the spouses governs. Law in force at time of declaration of homestead is not controlling: *Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335. (See page 598.)

## 6. RIGHT TO HOMESTEAD. "FAMILY."

To impress land with a homestead character, some real interest or ownership must exist, and a mere gratuitous



grantee of one who conveys to defraud his creditors does not acquire any real interest or ownership and such grantee is not entitled to an injunction against the sale of said land in satisfaction of the grantor's debts: *Kline v. Cowan*, 84 Kan. 772, 115 Pac. 587.

Others than heads of families may claim homesteads of certain value under the proper circumstances. Under Civil Code, Sec. 1260, subd. 2: *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266. (See page 599.)

#### 7. ABANDONMENT. STATUTE OF LIMITATIONS. SELECTION.

Upon the issue whether or not a homestead has been abandoned, the main question is that of the real intent of the homestead claimant and its determination involves a question of fact: *Carter v. Pickett*, 39 Okla. 144, 134 Pac. 440.

Temporary absence from the homestead does not constitute an abandonment thereof, where there exists at the time a definite and fixed intention to return: *Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441.

Permanent removal from the state constitutes an abandonment of the homestead: *Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441.

Where the removal from the homestead is unaccompanied by a present intention, existing at the time of the removal, to return thereto, but instead by a mere probable future purpose to so do, dependent on a contingency which might never happen, the homestead exemption is thereby abandoned: *Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441.

The intention to return, by which the homestead rights are reserved, must be formed at the time the removal occurs. It can have no influence whatever in restoring the right once lost by actual abandonment, until executed by a resumption of the occupancy that formerly characterized it as a homestead: *Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441.



Proof of the abandonment of a homestead must be clear and convincing in its nature. But where the only evidence of consequence is that of the homestead claimant herself, and shows a removal from the state, without any fixed and definite intention to return, a finding by the trial court that the homestead was abandoned will not be disturbed on appeal: *Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441.

Where the husband, without cause, abandoned his family who were residing upon the homestead, he may not maintain action of ejectment to dispossess his wife and family of said homestead or any part thereof: *Gooch v. Gooch*, 38 Okla. 300, 133 Pac. 243.

Two things must concur to show an abandonment of a homestead, viz., an intent to abandon and actual abandonment: *Edson-Keith & Co. v. Bedwell*, 52 Colo. 310, 122 Pac. 393.

A homestead is abandoned by the acquisition of another: *Northwest Threshing Co. v. McCarroll*, 30 Okla. 25, 120 Pac. 611.

A homestead declared by a married woman on her separate property for the benefit of herself and husband is not invalidated by the fact that at the time of the declaration, for the purpose of maintaining a home for themselves, she conducted a hotel and boarding house in a small dwelling situated on the property, which then was and continued to be their sole and bona fide residence: *McKay v. Gesford*, 163 Cal. 243, 124 Pac. 1016.

The fact that the spouses did not permanently occupy one or more rooms in such building, but shifted themselves about as the exigencies of their business demanded, did not warrant a determination that the building was not their place of residence: *McKay v. Gesford*, 163 Cal. 243, 124 Pac. 1016.

Homestead can be abandoned only as provided for by Civ. Code, Sec. 1243, that is, by declaration of abandonment or grant thereof: *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266.



Temporary absence will not defeat a homestead right and during such absence of the owner the premises may be rented without destroying their homestead character: *Shattuck v. Weaver*, 80 Kan. 82, 101 Pac. 649.

The word "abandoned" with reference to the abandonment of a homestead has a well defined meaning. It requires a union of the act of removing from the homestead, and an intention to not further retain it as a homestead, or the formation of an intention after such removal of remaining away; in other words the physical act of removing is not sufficient, unless intended or followed by an intention to actually abandon the homestead: *Jones v. Kepford*, 17 Wyo. 468, 100 Pac. 924.

The fact that one has voted in another state or territory does not conclusively establish the loss of a homestead right, which depends upon a residence in the state of Kansas: *Osage Mercantile Co. v. Blanc*, 79 Kan. 356, 99 Pac. 601. (See page 599:)

## 8. HOMESTEAD VESTS HOW.

**(1) Homesteads selected from community property.** Under section 1265 of the Civil Code of California and section 1474 of the Code of Civil Procedure, the title to a homestead declared by a wife upon community property rests in her upon the death of her husband without any administration upon his estate: *Hart v. Tabor*, 161 Cal. 20, 118 Pac. 252.

Where a wife declares a homestead on community property, it vests in her absolutely, upon the death of her husband, without administration, and it need not be inventoried in administering his estate: *Estate of Shirey*, 47 Cal. Dec. 223, 138 Pac. 994.

If a declaration of homestead is filed on community property by either spouse the homestead vests in the survivor and the court must set aside the homestead in community property, even though it was not declared during the life of a deceased spouse, the property being exempt from debts



of the surviving spouse on sale under execution: In re Cook's Estate, 34 Nev. 217, 117 Pac. 29.

Under section 1265 of the Civil Code, and section 1474 of the Code of Civil Procedure the title to a homestead declared by a wife upon community property vests in her upon the death of her husband without any administration upon his estate: Hart v. Taber, 161 Cal. 21, 118 Pac. 252.

Where a homestead is declared by the wife upon community property, and thereafter the husband makes a deed of gift of an undivided interest in the land to his wife, the interest conveyed vests in her as her separate property. Such a conveyance, however, does not have the effect to impair the homestead or to destroy the right of survivorship created thereby to the extent of the property conveyed: Wall v. Brown, 162 Cal. 307, 122 Pac. 478.

After a deed of gift to the wife, the homestead, which she had theretofore impressed on the whole property while it was community property, is not, as to the interest conveyed to her, to be deemed and treated as if selected from her separate property without her consent, and as vesting on her death in her heirs, under the provisions of section 1474 of the Code of Civil Procedure. On the contrary, upon the death of the wife, the whole of the property impressed with the homestead vested absolutely in the surviving husband: Wall v. Brown, 162 Cal. 307, 122 Pac. 478. (See page 601.)

**(2) Homesteads selected from separate property of persons selecting or joining in selection of same.** (See page 601.)

**(3) Homesteads selected from separate property without owner's consent.** A widow is entitled to a homestead in the separate property of her husband even where there are no minor children: Clarke v. Baker, 76 Wash. 110, 135 Pac. 1028.

**(4) Homestead declared by husband.** (See page 603.)



### 9. SETTING APART A HOMESTEAD.

The bare intention to create a home on a vacant lot at some future time, unaccompanied with actual occupancy of the lot, is not sufficient foundation upon which to base a claim of homestead exemption against an execution: *Laurie v. Crouch*, — Okla. —, 139 Pac. 304.

Where there is a fixed intention by an owner of a lot to presently occupy it as a home, accompanied with overt acts, which clearly manifest such intention, such as fitting up, building, or repairing a house thereon for occupancy, followed by actually moving thereon, without unreasonable delay, it might have the effect, at least in equity, of impressing the homestead character, so as to render the property exempt as against claims arising prior to actual occupancy by the family: *Laurie v. Crouch*, — Okla. —, 139 Pac. 304.

Under the laws of Nevada, a widow is not entitled to have a homestead set apart to her out of the separate estate of her deceased husband: *In re Cook's Estate*, 34 Nev. 217, 117 Pac. 31.

The power of the court to set apart the homestead to the "innocent party" for a "limited period" in a divorce action may not be exercised arbitrarily; but must be exercised by the court reasonably, and according as the facts of the case demand that it shall be applied; yet it must be put into operation in behalf of the wife, if she would retain any interest whatever in the homestead selected from the separate estate of the husband: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

In a divorce proceeding it is competent for the court in the decree to set aside the homestead to either party; but where no disposition is made thereof, the homestead remains to the husband, as the head of the family, discharged of all homestead rights or claims of the other party: *Goldsborough v. Hewitt*, 23 Okla. 66, 99 Pac. 907.

When under the laws of the state of Utah a homestead has been set apart to a surviving spouse and minor children,



or if there be no minor children to the surviving spouse, or, if there be no surviving spouse, to the minor children, the homestead becomes the absolute property of the persons to whom it was set apart, and it belongs to them (subject of course to any incumbrance given for the purchase price and other valid liens) and in such case the other heirs have no interest in or to a homestead so set apart: *Christensen v. Robinson*, 35 Utah 67, 99 Pac. 459. (See page 604.)

10. ORDER. IN GENERAL. (See page 604.)

11. ORDER. EFFECT OF. (See page 605.)

12. NO MONEY IN LIEU OF. (See page 605.)

13. APPRAISEMENT.

Civil Code, Sec. 1348, requires notice of time and of hearing in proceedings for appraisement and segregation of homestead from other property to be served on claimant at least two days before hearing: *Blood v. Munn*, 155 Cal. 228, 100 Pac. 694.

Effect of segregation under Civil Code, Sec. 1248, of homestead from other property in bankruptcy proceedings, is to divest segregated property of homestead character and render same liable for debts: *Blood v. Munn*, 155 Cal. 228, 100 Pac. 694. (See page 606.)

14. VALUE. (See page 606.)

15. DIVISION OR SALE. (See page 608.)

16. RIGHTS AND TITLE OF SURVIVOR, HEIRS, SUCCESSORS AND CHILDREN.

Where a husband dies seized in fee of land occupied and used by himself and family as a homestead, his surviving wife, although without children, is entitled, as against his heirs, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintain-



ing a home thereon: *Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220.

The homestead in the surviving spouse is subject to any mortgage by one in which the other joined: *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312.

Surviving spouse having died, heirs have not, under Code of Civil Procedure, Sec. 1485, right to have property other than homestead first applied to payment of debt secured by mortgage: *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312.

When a husband dies seized in fee of land occupied and used by himself and family as a homestead, his surviving wife, although without children, is entitled by reason of section 1607 Wilson's Rev. & Ann. Stat. 1903, as against his heirs, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintaining a home thereon: *Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220. (See page 608.)

## 17. EXEMPTION OF HOMESTEAD.

(1) **In general.** The fact that the wife was administratrix of her husband's estate, and the homestead property was appraised as part thereof, and distributed by the decree of distribution in undivided shares to her and to the children of the intestate, is not, as against a mere personal judgment creditor of the wife, a conclusive adjudication of the non-homestead character of the property and does not estop her from asserting her homestead right to the whole thereof: *Hart v. Tabor*, 161 Cal. 20, 118 Pac. 252.

Under the laws of Oregon, a homestead is exempt from execution where it is the actual abode of and owned by some member of the family: *Wilson v. Peterson*, — Or. —, 136 Pac. 1187.

The statutory exemption of the homestead from judicial sale for the satisfaction of a judgment may be waived or relinquished by abandonment of the homestead or by a conveyance thereof: *Dans v. Low*, 66 Or. 599, 135 Pac. 315.



Under the laws of Oregon a homestead is not subject to a mechanic's lien: *Dans v. Low*, 66 Or. 599, 135 Pac. 315.

Where a husband and wife occupy real estate owned by him as a homestead, his death will not operate to deprive the wife of the homestead exemption, although she may be the sole surviving member of the family, nor do the statutory provisions regarding the descent of the property to the surviving widow make her homestead subject to the payment of her husband's debts: *Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074.

The lien of a judgment is superseded and rendered non-enforceable on lands claimed as a homestead by the filing of the homestead declaration: *Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 393, following *Snelling v. Butler*, 66 Wash. 165, 119 Pac. 3.

That the homestead had a value in excess of \$2000 and that the court erred in failing to direct that the statutory steps be taken to subject it for sale for the excess value can not be raised for the first time on appeal: *Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 393.

Though a deed from husband to wife, on the record of which she made a homestead entry, was fraudulent as to creditors, it will not avoid the validity of the homestead entry: *Brooks v. Black*, 22 Colo. App. 49, 123 Pac. 133.

In the absence of a statutory provision exempting purchase-money obligations from the exemption laws, it is a principle of equity that a purchase-money mortgage given at the same time as the deed, or as a part of the same transaction, has precedence over any prior general liens, and that for the same reason which gives it that precedence it is superior to the homestead right of the mortgagor. And that is so although the wife or husband of the vendee does not join in the execution of the mortgage, or the right of homestead is not expressly waived or released by a recital to that effect in the mortgage: *Powers v. Pense*, 20 Wyo. 327, 123 Pac. 928.



A judgment becomes a lien upon a homestead, subject to the right of the owners to defeat an execution sale by the filing of a homestead declaration. When the declaration is filed the property becomes a homestead and as such it is exempt from execution or forced sale: *Snelling v. Butler*, 66 Wash. 165, 119 Pac. 4.

After a judgment lien has attached to real estate it can not be divested by its occupancy for homestead purposes; *Northwest Thresher Co. v. McCarroll*, 30 Okla. 25, 118 Pac. 352.

Deeds made by or between the spouses with intent to protect against the claims of creditors do not defeat the right to claim a homestead in the property. The decree sought for in a suit to set aside such deeds on the ground of fraud, being tantamount to an execution, would be covered by the exemption clauses of the statute: *Bowman v. Sherrill*, 59 Or. 603, 117 Pac. 1122.

Under Tax Act of March 20, 1905, property of decedent set apart absolutely as homestead by probate court under Code of Civil Procedure, Sec. 1465, is not liable to inheritance tax: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280.

Judgment not within scope of Civil Code, Sec. 1241, making homestead subject to execution of certain judgments, creates no lien against homestead: *Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266.

Where one held vendor's lien on N. place which was subordinated to claims of subsequent mortgage on N. place, which mortgage also covered K. place, after-declared homestead upon K. place did not entitle debtor to have N. place first sold to satisfy mortgage, but equity of vendor's lien being prior to equity of after-declared homestead on K. place, vendor was entitled to have K. place first sold to satisfy mortgage: *Nolan v. Nolan*, 155 Cal. 476, 101 Pac. 520, 132 Am. St. 99.

Under the facts stated in the opinion it is held that a tract of land is not occupied as a residence of the family of



the owner, so as to exempt it from sale upon execution for his debts: *Quinton v. Adams*, 83 Kan. 484, 112 Pac. 95.

When a statute exempts a homestead from sale under execution, a judgment, obtained against a homestead debtor after the acquisition of the homestead right, will not create such a lien upon the homestead as can be enforced while it retains its homestead character in the hands of the debtor: *Hansen v. Jones*, 57 Or. 416, 109 Pac. 869.

Sections 221-226 B. and C. Comp. Laws of Oregon is only a statute of exemption and contains no other elements. It does not create a homestead in which the wife or children have any right other than the right of owner thereof, or the wife, husband, agent, or attorney of said owner, to claim it exempt from attachment, levy, or sale on execution and this right continues after the death of the owner: *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 473.

Sections 5 and 6 of the statute of descents and distributions (Gen. Stats. 1901, Secs. 2507, 2508, of Kansas) providing for the distribution of the homestead of an intestate, are not in conflict with the provisions of section 9, article 15, of the constitution exempting the homestead from forced sale under any process of law: *Towle v. Towle*, 81 Kan. 675, 107 Pac. 228.

The sale of a homestead in partition under the provisions of section 6 of the statute of descents and distribution of the state of Kansas is not a forced sale within the meaning of that term as used in section 9 of article 15 of the constitution: *Towle v. Towle*, 81 Kan. 675, 107 Pac. 228.

While the legislature (Kansas) is without power to enact a law limiting or restricting the homestead right guaranteed by section 9 of article 15 of the constitution, it has the power to enact laws which in effect add to or increase the exemptions provided by the constitution: *Towle v. Towle*, 81 Kan. 675, 107 Pac. 228.

A mechanic's lien having attached before a declaration of homestead was made and filed, the lien takes precedence of



the homestead: *Olson v. Goodsell*, 56 Wash. 251, 105 Pac. 463. (See page 610.)

(2) **Policy of the law.** Homestead and exemption laws are not in derogation of the common law, but are to be liberally construed for the purpose of giving effect to the beneficial object in view: *Edson-Keith Co. v. Bedwell*, 52 Colo. 310, 122 Pac. 393.

Whatever liberality should be given the construction of the homestead exemption laws of the state of Utah, they ought not to be so construed as to give a debtor the power by his own acts to deprive others of rights previously obtained in his property: *Volker Scewcroft Lumber Co. v. Vance*, 36 Utah 348, 103 Pac. 974. (See page 610.)

(3) **Construction of codes.** It is sufficient to stay a judicial sale of a homestead under a judgment if the notice of claim of homestead be given to the sheriff any time before the sale: *Wilson v. Peterson*, — Or. —, 136 Pac. 1187. (See page 611.)

(4) **“Family” of owner.** The benefits of a homestead exemption provided by the constitution of Oklahoma are not reserved to the head of the family alone, but to the entire family, without regard to whether the husband or the wife is the owner of the title: *Gooch v. Gooch*, 38 Okla. 300, 133 Pac. 242. (See page 612.)

(5) **Limit as to value.** (See page 613.)

#### REFERENCES.

As to whether homestead exemption attaches to the surplus upon foreclosure of a lien paramount to the homestead right, see note 18 L. R. A. (N. S.) 491.

### 18. ALIENATION OF HOMESTEAD.

The statute of Kansas (Gen. Stats. 1909, Sec. 3648) precluding the maintenance of an action for the specific performance of a contract to sell or exchange a homestead unless the contract for sale is signed by both husband and



wife or by an agent authorized in writing by both to make such sale or exchange, is not complied with by depositing a deed signed by husband and wife with a custodian, to await completion of a pending sale, but who is not authorized to deliver it: *Martin v. Hush*, — Kan. —, 139 Pac. 401.

The owner of land occupied by himself and wife as their homestead made, without his wife's knowledge or consent, a verbal agreement with an adjoining landowner by which a fence standing on the homestead should be the boundary line and for some years thereafter the agreement was acquiesced in by both parties and defendant occupied up to the fence. Thereafter the owner of the homestead, his wife joining, sold and conveyed the entire tract of land to the plaintiff, who sued the defendant on ejectment to recover the strip of land between the true boundary and the fence. Held that the land being a part of the homestead, the agreement or contract with the husband, made without the joint consent of the wife, was ineffectual, and that upon the facts stated in the opinion the plaintiff was entitled to judgment: *Kastner v. Baker*, — Kan. —, 139 Pac. 1189.

Where land is occupied by a son and his wife and the son has supported his father for a number of years under an agreement that he is to become at once the owner of the land and that the legal title is to be vested in him at his father's death by will or otherwise and the son in reliance on such agreement has improved the property and performed services and has also obtained an injunction against the execution by his father of a deed to some one else, the title to the land can not be effected by an instrument signed by the son alone and to which his wife has not consented: *Holland v. Holland*, — Kan. —, 132 Pac. 989.

Where a deed to property occupied as a homestead is made by the spouse in whom the legal title is vested, the other not consenting, a conveyance made by the grantee while such occupancy continues will be a nullity, even if made for value to one having no actual notice of the homestead character of the property: *Cropper v. Goodrich*, — Kan. —, 132 Pac. 163.



Where husband and wife sign a deed to the homestead of the family under agreement that the same shall not be delivered to the grantee named therein, and the husband, without the consent of the wife, delivers the deed to the grantee, who has notice of the agreement, the deed may be avoided by the wife after the death of her husband: *Couch v. Eddy*, 35 Okla. 355, 129 Pac. 709.

A homestead can be alienated or incumbered only by the joint consent of the husband and wife, and when the title is in the wife, the written consent of the husband to mortgage on certain conditions is not sufficient when such conditions are not accepted: *National Bank of Norton v. Duncan*, 187 Kan. 610, 125 Pac. 76.

Under the Act of 1901 (Session Laws of Oklahoma of 1901, p. 78, Ch. 10, Comp. Laws 1909, Sec. 1187), which provides that no deed, mortgage or contract relating to the homestead shall be valid unless in writing and subscribed to by both husband and wife, an instrument executed by the husband alone, conveying a right of way for a period of ten years over the part of the homestead, is not valid as against the wife. Such a contract being invalid in 1906 at the time of its execution, was not validated by the subsequent adoption of article 12, section 1, of the constitution, limiting the value of the homestead to \$5000: *Kelly v. Mosby*, 34 Okla. 218, 124 Pac. 984.

Under the provisions of section 17 of the Creek Supplemental Agreement, approved June 30, 1902 (32 Stats. L. 504, Ch. 1323), a Creek citizen may rent his homestead allotment for a period of five years for agriculture, but without any stipulation or obligation to renew the same: *Groom v. Wright*, 30 Okla. 652, 121 Pac. 215.

Under section of the Creek Supplemental Agreement approved June 30, 1902, providing that the homestead of citizen allottees shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from date of deed therefor, is subject to the permissive provisions of section 17 following, expressly authorizing Creek citizens to rent their allotments for a period not to



exceed five years for agricultural purposes: *Groom v. Wright*, 30 Okla. 652, 121 Pac. 215.

Under the laws existing in Oklahoma Territory on June 13, 1901, the title to the homestead being in the husband, he having mortgaged the same without being joined by his wife, his rights in such homestead were concluded thereby. (a) Foreclosure proceedings having been instituted, to which the wife was made a party, by answering and setting up her right therein, such mortgage could thereby be avoided as to such rights, and foreclosure decreed only against the rights of the husband and subject to all homestead rights of the wife as long as they should exist: *Malory v. Wm. Cameron Co.*, 29 Okla. 763, 119 Pac. 587.

Prior to the Act of March 15, 1905 (Session Laws of Oklahoma 1905, Ch. 18, p. 255), the title for homestead was in the husband as the head of the family. If title to property occupied by the family was in the wife, she could convey it without the joinder of the husband in the deed, for the reason that the same did not become impressed with the character of a homestead: *Herbert v. Wagg*, 27 Okla. 674, 117 Pac. 210.

A deed of property covered by a homestead for a public highway, in which the husband is the sole grantor, does not purport to transfer or encumber any interest of the wife, and although signed by her, is not good as a dedication by her for the reason that the instrument does not indicate such interest on her part: *Cordano v. Wright*, 159 Cal. 610, 115 Pac. 227.

The fact that the wife was administratrix of her husband's estate, and the homestead property was appraised as a part thereof, and distributed by the decree of distribution in undivided shares to her and to the children of the intestate, is not, as against a mere personal judgment creditor of the wife, a conclusive adjudication of the nonhomestead character of the property, and does not estop her from asserting her homestead right to the whole of the property: *Hart v. Taber*, 161 Cal. 21, 118 Pac. 252.

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Neither of the spouses can, in law, grant any right in the homestead property without the consent of the other; and neither of them can create an equity therein by parol gift, without the consent of the other. Yet, where it appears that an executed parol gift of a lot thereon was made by the joint act of both husband and wife to their son, for a consideration previously received from him, and also his fencing and improving the same for a home, which he did, at great expense to himself, equity will protect such executed parol gift; and findings and a judgment enforcing them will not be disturbed, notwithstanding a conflict of evidence, where there is sufficient evidence to support the findings: *Kinsell v. Thomas*, 18 Cal. App. 683, 124 Pac. 220.

A parol gift of real property by the husband and wife, for whose benefit a homestead has been declared on the property and is in existence at the time of such gift, may and will be enforced by a court of equity when the circumstances of such a gift are similar to those under which a like gift of real property not impressed with a homestead will be enforced: *Kinsell v. Thomas*, 18 Cal. App. 683, 124 Pac. 220.

Where it is found that the wife declared a valid homestead upon certain lots occupied by the husband and wife, including certain shares of water used in connection therewith and appurtenant thereto, it follows that the deed of the husband for one-half of such homestead property and one-half of such water rights to a third person is not only inoperative and ineffectual as a conveyance of any part of the lots described in the declaration of homestead, but is likewise inoperative and ineffectual as a conveyance of any part of the shares of water represented thereby and appurtenant thereto: *Swan v. Walden*, 19 Cal. App. 127, 124 Pac. 857.

A mortgage executed in the form of an absolute deed upon land upon which a homestead is thereafter declared is not void because the contemporaneous agreement declaring the deed to be a mortgage to secure present indebtedness and future advances is neither signed nor acknowledged by the husband and wife: *First National Bank v. Merrill*, 47 Cal. Dec. 377, 139 Pac. 1066.



The requirement that the defeasance be acknowledged by husband and wife in the case of an encumbrance upon an existing homestead has no application to a mortgage created before the existence of the homestead: *First National Bank v. Merrill*, 47 Cal. Dec. 377, 139 Pac. 1066.

The fact that the mortgage was not recorded until after the filing of the homestead does not make it unenforceable because of the homestead rights: *First National Bank v. Merrill*, 47 Cal. Dec. 377, 139 Pac. 1066.

Declaration of homestead made by wife with knowledge that her husband had previously given option to purchase to plaintiff was subject to his right to demand conveyance of land: *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689.

Deed executed and acknowledged by husband and wife as provided by Stats. 1862, p. 519, Ch. 396, was sufficient to pass easement in private way which was part of homestead, where such deed described land conveyed as bounded by such private way: *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690.

By the weight of authority, a debtor who has mortgaged an existing homestead will be heard, upon a marshaling of securities, to insist that recourse shall last be had to the homestead property, even though by so doing the security of certain creditors upon other lands is impaired or destroyed: *Nolan v. Nolan*, 155 Cal. 476, 101 Pac. 520, 132 Am. St. 99.

Homestead claimant may have his homestead protected and preserved so far as possible when it is covered by mortgage which also includes other property by requiring other property to be sold and applied upon debt before sale of homestead. Where property has been mortgaged as one tract and is later segregated into homestead and nonhomestead property, homestead claimants in respect to enforcement of lien stand in same situation as surety for payment of debt and are entitled to demand that nonhomestead tract be first sold and applied on debt. If creditor without debtor's consent releases property so first chargeable, claimant is



entitled to credit of value of same: *Blood v. Munn*, 155 Cal. 228, 100 Pac. 694.

Where mortgagee released nonhomestead tract where mortgage included both homestead and nonhomestead tract and nonhomestead tract was sold in bankruptcy and mortgagee received proceeds of sale, mortgagors were entitled to credit for entire value of nonhomestead tract but not for both value and amount received from sale: *Blood v. Munn*, 155 Cal. 228, 100 Pac. 694.

Husband held not estopped by bankruptcy proceedings, judgments, or decrees in wife's bankruptcy proceedings, from asserting such right: *Blood v. Munn*, 155 Cal. 228, 100 Pac. 694.

Considering the constitutional and statutory provisions of the state of Wyoming as a whole it was clearly the intention of the legislature to require that an instrument of alienation of a homestead or any interest therein should contain a clause releasing or waiving the right of homestead and reference should be made thereto in the certificate of acknowledgment, to make a valid conveyance of a homestead or to release the homestead interest in the land conveyed: *Jones v. Losekamp*, 19 Wyo. 83, 114 Pac. 675.

Where in Wyoming a lease invalid on account of noncompliance with the statutory requirements, was granted of the whole of the premises occupied as a homestead which were of greater value than the statutory limit, the lease will be good for the portion of the property exceeding that limit in value: *Jones v. Losekamp*, 19 Wyo. 83, 114 Pac. 677.

Prior to the Act of March 15, 1905 (Laws of Oklahoma 1905, Ch. 18), plaintiff's grantor, a married woman, was vested with title to certain lots not impressed with the homestead character. Said act impressed them as such, the same being built upon and occupied as the home of herself and family. Thereafter plaintiff in error obtained judgment in a court of record against plaintiff's grantor, which became a lien on her real property not exempt. Subsequently plaintiff's grantor, her husband not joining, made to plaintiff a



warranty deed to said lots and placed her in possession. Plaintiff in error, to satisfy said judgment, thereupon levied an execution on said lots, to which the husband of plaintiff's grantor after said levy made to plaintiff his separate warranty deed. In an action of plaintiff to clear her title, held that said deed made by plaintiff's grantor was not void and vested in plaintiff the title to said lots, subject to be avoided only by the nonjoining spouse; that a failure to avoid said deed by him, after due notice as provided by Wilson's Rev. & Ann. Stats., Okla. 1903, Sec. 883, concluded his right so to do, and that a demurrer to plaintiff's petition setting forth said facts in an action to enjoin a sale under said execution whereby a lien by virtue of said judgment was sought to be enforced, and to clear her title, was properly overruled: *Love v. Cavett*, 26 Okla. 179, 109 Pac. 553.

A homestead is purely statutory and therefore gives no greater right nor estate than the statute creates and if the statute contains no prohibition against a conveyance or devise, then none exists: *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 473.

Where land was purchased by a married woman for a home and after she and her husband had erected a house thereon it was their intention to occupy it as a permanent residence. More than a year before her death the wife alone made a warranty deed of the property. Neither husband nor wife was living on the premises at the time this deed was delivered. The right to a homestead does not consist in purchasing property for a homestead, but in actually occupying it as such: *Allen v. Shires*, 47 Colo. 433, 107 Pac. 1070.

A widow occupying a homestead, the title to which descended to her and her children, can not complain of the forced sale of an adult son's share, and after the minor children have all arrived at the age of majority the purchaser of such share is entitled to partition: *First National Bank v. Carter*, 81 Kan. 694, 107 Pac. 234.

A homestead declaration filed after the execution and filing of a mortgage on the property of a husband as an



unmarried man, though after his marriage, is ineffectual as against the mortgage: *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 1.

The separate deed of a married man, the head of a family, to the homestead is void: *Goldsborough v. Hewitt*, 23 Okla. 66, 99 Pac. 907.

Where a gas company has run its pipe line across homestead property and it appears that the husband and wife have each separately given consent thereto it is immaterial that the consent was not given jointly: *Ralston v. Wichita Gas Co.*, 81 Kan. 86, 105 Pac. 430.

Where property has once been impressed with the homestead character, no act or omission on the part of the husband, without the consent of his spouse, can result in an abandonment of the homestead by the family. The homestead is for the benefit of the entire family, and such joint interest is to be regarded as paramount to the rights of any individual member thereof: *Alton Mercantile Co. v. Spindel*, — Okla. —, 140 Pac. 1168.

An insane spouse is incapable of giving her free consent to an abandonment of the homestead, although confined in an insane asylum in another state: *Alton Mercantile Co. v. Spindel*, — Okla. —, 140 Pac. 1169.

A homestead, the title to which is in the husband, can not be sold or otherwise alienated by the husband without the wife joining in the conveyance, unless the wife has voluntarily abandoned the husband or, for any cause, has taken up her residence out of the state for a period of one year or more. A deed to a homestead executed by a husband without such abandonment or removal of residence on the part of the wife is void: *McWhorter v. Brady*, — Okla. —, 140 Pac. 783. (See page 613.)

#### REFERENCES.

Power of husband to create easements in homestead without wife's consent, see note 27 L. R. A. (N. S.) 963.

Validity of conveyance or encumbrance of homestead by wife after abandonment by husband, see note 36 L. R. A. (N. S.) 1024.



## 19. PRESENTATION OF CLAIMS.

- (1) **In general.** (See page 614.)
- (2) **Necessity of presentment.** (See page 614.)
- (3) **Statute of limitations.** (See page 614.)

## 20. FORECLOSURE WITHOUT PRESENTMENT.

When a mortgage was executed by a husband and wife on land a part of which was subject to a homestead declared by him, and upon the death of the husband an insufficient claim on the mortgage indebtedness was allowed by his administrator and approved by the court, and thereafter and subsequent to the death of the wife, under a probate sale in his estate, the entire land was sold subject to the mortgage to the mortgagee, the latter becomes a mortgagee in possession, and in an action by the successors in interest of the wife to quiet their title and recover possession of the land embraced in the homestead, the mortgagee may set up the mortgage indebtedness and have a foreclosure of the mortgage as to the entire mortgaged premises: *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312. (See page 616.)

## 21. LIENS AND PAYMENT. (See page 617.)

## 22. DETERMINATION OF RIGHT.

Where the husband remarried, and the record shows no second homestead in favor of the second wife, the former homestead, as such, could not inure to her benefit: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

Where a homestead was declared by a husband upon his separate property for the benefit of himself and wife, and he subsequently obtained a divorce from the wife, in which proceeding no order was made assigning the homestead to the wife for a "limited period," as provided in subdivision 4 of section 146 of the Civil Code, her rights in the homestead were absolutely terminated upon the entry of the final decree of divorce in favor of the husband. If the wife's rights are



not reserved in the decree, they are destroyed forever: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

When a wife, after the divorce, seeks to assert any claim to any part of the husband's property, homestead or otherwise, she must establish that right by the decree, or by a valid contract between herself and husband: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

Where the decree is silent as to the homestead, it is to be presumed that at the time of granting the divorce it made no order with reference to the homestead, neither assigning it to the "former owner" of the property, nor to the wife "for a limited period": *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

Where the wife made no appearance in the divorce suit brought against her by her husband, and allowed the judgment to be entered upon her default, it may be assumed that the evidence must have disclosed that she was not entitled to consideration as one to whom the homestead should be assigned "for a limited period": *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

In an action by the administrator of the divorced wife of deceased, to quiet her title to the homestead as surviving spouse, the court properly excluded the declaration of homestead in her favor, and granted a nonsuit as to defendants: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

The homestead having been selected from the husband's separate property, when the wife's interest therein terminated by the decree of divorce, no order of court was necessary to revest the whole interest in the divorced husband when the wife's interest therein had ceased, but the whole homestead ceased as to that family, and the property remained in the former owner, freed and unencumbered by any claim of the former wife: *Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989. (See page 618.)

### 23. PARTITION OF HOMESTEAD. (See page 619.)



## II. PROBATE HOMESTEADS.

### 1. IN GENERAL.

When a homestead has been set apart to a surviving spouse and minor children, or if there be no minor children, to the surviving spouse, or if there be no surviving spouse to the minor children, the homestead becomes the absolute property of the persons to whom it was set apart, and the other heirs of the intestate have no interest in or to a homestead so set apart: *Christianson v. Robinson*, 35 Utah 67, 99 Pac. 459.

The court in the administration of the estate of a decedent can not set apart lands of the estate as a probate homestead, unless they were lands upon which a homestead could have been impressed in the lifetime of the deceased: *Estate of Davidson*, 159 Cal. 98, 115 Pac. 49.

Under both the early homestead acts, and the present code provisions respecting homesteads, a homestead can not be created by one joint tenant in lands held in joint tenancy or as tenants in common, except as authorized by the act of 1868 (Stats. 1868, p. 116), which provides that a homestead may be declared upon land of a cotenancy where the declarant is in the exclusive occupation of it and residing thereon: *Estate of Davidson*, 159 Cal. 98, 115 Pac. 49. (See page 620.)

### 2. DEFINITION OF HOMESTEAD. (See page 620.)

### 3. RESIDENCE NOT ESSENTIAL.

### 4. PURPOSE AND CONSTRUCTION OF STATUTE. MANDATORY NATURE OF PROCEEDING.

(See page 621.)

### 5. RIGHT PARAMOUNT TO TESTAMENTARY DISPOSITION.

Homestead and family allowance set apart by order of probate court is not derived by will, though beneficiaries be devisees and legatees thereunder, and is not subject to



inheritance tax: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280.

Specific devise of property will not defeat power of probate court to set it apart as homestead for surviving family: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280. (See page 621.)

## 6. APPLICATION. JURISDICTION.

In settling up the estate of a decedent, and setting apart a homestead, the court is dealing only with the property of the estate. It has no jurisdiction, in a proceeding of this character, to determine the title to the property, or the validity of any claim of title adverse to that of the estate: *In re Niccoll's Estate*, 164 Cal. 368, 129 Pac. 278, 280.

An order setting apart property absolutely to a surviving husband in the administration of the estate of his deceased wife is without jurisdiction, where the property is found to belong to the community: *Estate of Klumpke*, 47 Cal. Dec. 390, 139 Pac. 1062. (See page 622.)

## 7. HOW TO BE SELECTED. (See page 623.)

## 8. PROCEDURE AND PRACTICE. (See page 624.)

## 9. APPRAISEMENT. (See page 624.)

## 10. PROPERTY SUBJECT TO.

The court in the administration of the estate of a decedent can not set apart lands of the estate as a probate homestead, unless they were lands upon which homestead could have been impressed in the lifetime of the deceased: *Estate of Davidson*, 159 Cal. 98, 115 Pac. 49.

The provision of section 1465 of the Code of Civil Procedure as to the setting apart of a homestead from the common property can be read only as meaning such common property as is a part of the estate under administration, and consequently within the jurisdiction of the court in probate,



as in the case of a deceased husband leaving community property: Estate of Klumpke, 47 Cal. Dec. 390, 139 Pac. 1062.

The superior court sitting as a court in probate has no power under section 1465 of the Code of Civil Procedure in an administration upon the estate of a wife, to select and set apart a homestead to the surviving husband out of what was community property of the spouses, where no homestead was selected during their lives, or to select and set apart such a homestead from any property other than the separate property of the wife: Estate of Klumpke, 47 Cal. Dec. 390, 139 Pac. 1062. (See page 624.)

#### REFERENCES.

Right to claim homestead in property used as a hotel or boarding house, see note 41 L. R. A. (N. S.) 303.

### 11. PROPERTY NOT SUBJECT TO.

The court as a probate court has no jurisdiction to set apart property as a homestead where the same is alleged in the petition therefor to be the separate property of the petitioner: Estate of Klumpke, 47 Cal. Dec. 390, 139 Pac. 1062.

After the death of the husband, the probate court can not set apart to the wife as a homestead the mere undivided interest of the husband in the cotenancy property, leaving her own undivided interest therein unimpressed with the homestead characteristics: Estate of Davidson, 159 Cal. 98, 115 Pac. 49. (See page 626.)

### 12. WIDOW'S RIGHT. IN GENERAL. (See page 627.)

### 13. WIDOW'S RIGHT. HOW NOT AFFECTED. (See page 628.)

### 14. WIDOW'S RIGHT. LIMITATIONS ON. (See page 629.)



## 15. LIMITED HOMESTEAD.

(1) **In general.** Under section 1468 of the California Code of Civil Procedure, as amended in 1861, where no homestead has been selected, the court in setting apart a homestead from the separate property of the decedent can do so for a limited period only: *Estate of Niccolls*, 164 Cal. 368, 129 Pac. 278.

Where no homestead has been selected during the lifetime of the decedent, the court in probate, in setting apart a homestead from the separate property of the decedent, can set it apart for a limited purpose only. Under the provisions of the Code of Civil Procedure, as originally enacted, the power of the court was not so restricted (*Mawson v. Mawson*, 50 Cal. 539). Section 1468 of the Code of Civil Procedure, was, however, amended in 1881 (Stats. 1881, p. 8) by the addition of this clause: "If the property set apart be a homestead, selected from separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order." The new clause applies to homesteads set apart in probate proceedings, no homestead having been theretofore selected. Its effect, as to such cases, is to alter the rule declared in *Mawson v. Mawson*, *supra*, and to take from the court the power to assign a homestead absolutely except where the property set apart is community property: *In re Niccoll's Estate*, 164 Cal. 368, 129 Pac. 278, 279.

Where a widow petitions to have a portion of the estate of her deceased husband set apart to her as a homestead, alleging the property to be his separate estate, the decree setting aside the homestead as prayed is binding upon her and her heirs, and estops them from asserting that the property belonged to the community (department opinion): *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690. (See page 629.)

(2) **Dissenting opinions.** (See page 631.)



**16. SURVIVING HUSBAND'S RIGHT. (See page 623.)****REFERENCES.**

When homestead deemed "otherwise disposed of according to law," within statute providing for its continuance until that time: 30 L. R. A. (N. S.) 921.

**17. MINOR CHILDREN'S RIGHT.**

Rights conferred by probate homestead can not be surrendered by one or more of beneficiaries to detriment of minors: *Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 Pac. 560. (See page 633.)

**18. NO MONEY IN LIEU OF HOMESTEAD.  
(See page 634.)****19. ORDER. NOTICE. VALIDITY. (See page 634.)****20. ORDER. EFFECT OF.**

An order setting apart a homestead has no other effect than to withdraw the property from administration, and to that extent relieve the executor or administrator from the necessity of accounting therefor: *Estate of Klumpke*, 47 Cal. Dec. 390, 139 Pac. 1062. (See page 635.)

**21. ORDER. FINALITY AND CONCLUSIVENESS.**

Order setting apart homestead for decedent's family including widow, made without adverse appearance or contest though conclusive as to property set apart, held not judicial determination of widowhood, binding in all future proceedings: *In re Hancock's Estate*, 156 Cal. 804, 106 Pac. 58. (See page 636.)

**22. POWER TO ENCUMBER OR ALIENATE.  
(See page 637.)****23. MORTGAGE LIEN. PRESENTATION OF CLAIMS.  
(See page 638.)**



24. VALUE. (See page 639.)

25. WAIVER, LOSS AND DETERMINATION OF  
RIGHT. (See page 641.)

26. VESTING OF TITLE. (See page 643.)

27. VACATING ORDER. COLLATERAL ATTACK.  
(See page 643.)

28. EXEMPTION OF HOMESTEAD.  
(See page 644.)

29. APPEAL. (See page 644.)

#### REFERENCES.

Crops grown on homestead, or proceeds thereof as exempt, see  
note 32 L. R. A. (N. S.) 577.

#### CHAPTER III.

HOMESTEADS OF INSANE PERSONS. IN GENERAL.

IN GENERAL. (See page 651.)



## CHAPTER IV.

## DOWER AND CURTSEY.

1. In general.
2. Dower. Power to modify right.
3. Dower. Law governing.
4. Dower. Rights of doweress.
  - (1) In Kansas.
  - (2) In Utah.
  - (3) In Montana.
  - (4) In Oregon.
  - (5) In Hawaii.
  - (6) In Colorado.
  - (7) In Indian Territory.
5. Curtesy. Relinquishment.
  - (1) In Colorado.
  - (2) In Oregon.
  - (3) In Oklahoma or Arkansas.

## 1. IN GENERAL.

Before assignment of dower there is no right to an undivided one-third or any particular part: *Neal v. Davis*, 53 Or. 423, 101 Pac. 212, Id. 99 Pac. 69. (See page 660.)

## 2. DOWER. POWER TO MODIFY RIGHT.

(See page 660.)

## 3. DOWER. LAW GOVERNING.

Dower is merely an inchoate right which may or may not ripen into a vested interest and a wife is not required to stand guard over her husband and apprise those who are about to deal with him of her rights. Neither is she bound or even affected by his representations that he is unmarried unless she knowingly or under peculiar circumstances amounting to knowledge, permits innocent persons to deal with him while in good faith believing that he is what he represents himself to be: *Hilton v. Sloan*, 37 Utah 359, 108 Pac. 696. (See page 660.)



#### 4. DOWER. RIGHTS OF DOWERESS.

(1) **In Kansas.** The widow's right to dower under Sec. 2510, Gen. Stats. 1901, state of Kansas, may be lost by acquiescence, ratification, consent, or estoppel, and also by the statute of limitations, which begins to run from the time when the husband's grantee takes adverse possession of the land: *French v. Poole*, 83 Kan. 281, 111 Pac. 488. (See page 661.)

(2) **In Utah.** The law favors the dower right, and is tenacious in protecting the wife's right in her husband's estate and the doctrine seems established in the United States at least that the mere claim of bona fide or innocent purchasers for value is not ordinarily available as against a widow's claim of dower: *Hilton v. Sloan*, 37 Utah 259, 108 Pac. 696. (See page 661.)

(3) **In Montana.** (See page 663.)

(4) **In Oregon.** (See page 664.)

(5) **In Hawaii.** (See page 664.)

(6) **In Colorado.** There is no right to dower in the state of Colorado: *Deutsch v. Rohfling*, 22 Colo. App. 543, 126 Pac. 1126.

(7) **In Indian Territory.** The United States courts for Indian Territory, sitting in probate, were, by Act of Congress of May 2, 1890, Ch. 182, 26 Stats. 81, which extended to and put in force in Indian Territory Mansf. Dig., Ch. 53 on "dower," vested with jurisdiction to allot dower in personality belonging to estates in course of administration therein: *Burdett v. Burdett*, 26 Okla. 416, 109 Pac. 922.

Policies of insurance issued to insured on his own life, payable to himself, or, at his death to his "executors, administrators, or assigns," were his separate property, the proceeds of which, if not otherwise disposed of by him, go to his executors as part of his estate, subject to the widow's dower, as provided in Mansf. Dig., Ch. 53, extended over



and in force in Indian Territory at the time of his death: *Burdett v. Burdett*, 26 Okla. 416, 109 Pac. 922.

5. CURTESY. RELINQUISHMENT. (See page 664.)

(1) **In Colorado.** The husband's estate by curtesy has no existence or recognition in the state of Colorado: *Deutsch v. Rohfling*, 22 Colo. App. 543, 126 Pac. 1126.

When a testatrix in Colorado wills away from her husband more than one-half of her estate and the husband does not in writing consent to the will, the testatrix dies intestate as to one-half of her estate and the devises and legacies mentioned in her will must abate to the extent of one-half and the husband's children are entitled to one-half of the estate of the testatrix: *Wolfe v. Mueller*, 46 Colo. 335, 104 Pac. 489.

(2) **In Oregon.** Notwithstanding the provisions of the constitution and laws of the state of Oregon it would seem that in that state a husband is still entitled to an estate by the curtesy in his wife's real estate: *Runyan v. Winstock*, 55 Or. 202, 104 Pac. 418.

(3) **In Oklahoma or Arkansas.** Upon the passage and approval of Act of May 2, 1890, Ch. 182, 26 Stats. 94 of Oklahoma, which extended over and put in force in the Indian Territory the common law of England as adopted by the state of Arkansas, with the proviso excepting Indians and their estates, an Act of June 7, 1897, Ch. 3, 30 Stats. 83, which provided that such laws should apply to all persons of the Indian Territory, irrespective of race, and the Curtis Act of June 28, 1898, Ch. 517, 30 Stats. 495, which provided that the laws of Indian tribes should no longer be enforced, title by curtesy consummate, as it existed in the state of Arkansas, attached in favor of the husband to all lands of which the wife became seized during coverture: *Johnson v. Jimpson*, — Okla. —, 139 Pac. 129; *Irving v. Diamond*, — Okla. —, 129 Pac. 575.



Under curtesy consummate, as it existed in the state of Arkansas, whatever interest the husband acquired in the lands of his wife by marriage could be swept away by her subsequent conveyance or devise of them: *Johnson v. Jimpson*, — Okla. —, 139 Pac. 129; *Irving v. Diamond*, — Okla. —, 129 Pac. 575.



# **PART VII.**

## **CLAIMS AGAINST ESTATE.**

### **CHAPTER I.**

- § 440. Notice to creditors. Additional notice.**
- § 443a. Filing copy of printed notice to creditors.**
- § 449. Time within which claims must be presented.**
- § 462. Rejected claims to be sued for within three months.**

### **CLAIMS AGAINST ESTATE.**

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**CLAIMS AGAINST ESTATE.**

**§ 440. Notice to creditors. Additional notice.** Every executor, or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the judge or court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice, provided that said residence or place of business shall be in the county in which said proceeding is had. Such notice must be published at often as the court or judge shall direct, but not less than once a week for four weeks. The court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1881), § 1490.**



**§ 443a. Filing copy of printed notice to creditors.** Within thirty days after the first publication of notice to creditors, the executor or administrator must file or cause to be filed in the court a printed copy of said notice to creditors accompanied by a statement setting forth the date of the first publication thereof and the name of the newspaper in which the same is printed.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1884), § 1491a.**

**§ 449. Time within which claims must be presented.** All claims arising upon contracts, whether the same be due, not due, or contingent, and all claims for funeral expenses and expenses of the last sickness must be presented within a time limited in the notice, and any claims not so presented, are barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1884), § 1493.**

**§ 462. Rejected claims to be sued for within three months.** When a claim is rejected either by the executor or administrator, or a judge of the superior court, written notice of such rejection shall be given by the executor or administrator to the holder of such claim or to the person presenting the same and the holder must bring suit in the proper court against the executor or administrator within three months after the date of service of such notice if the claim be then due, or within two months after it becomes due, otherwise the claim shall be forever barred.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1885), § 1498.**

## 1. NOTICE TO CREDITORS.

(1) **In general.** The provision contained in the Act of March 16, 1897, of the state of Washington (Laws 1897, p. 285, Ch. 98, Sec. 1), for notice to creditors and barring all claims not presented within the year relates to a mere matter of procedure and is not obnoxious to any provision



of the constitution of the United States or of the state of Washington, whether the provision be made applicable to estates already in course of administration or to estates to be administered upon in the future: *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1028.

The legislature of the state of Washington had power to extend the provisions of the Act of 1897 to nonintervention wills already executed in so far as the requirement of notice to creditors and the barring of claims is concerned, and it is manifest that the legislature intended to do so: *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1028. (See page 695.)

**(2) When not necessary.** (See page 696.)

**(3) Time of. Dependent on value of estate.** (See page 696.)

**(4) Additional notice. New notice.** (See page 697.)

**(5) Publication.** Under section 1491a of the Code of Civil Procedure, within thirty days after the first publication of notice to creditors of a deceased person, the executor or administrator must file, or cause to be filed, in court, a printed copy of said notice accompanied by a statement setting forth the date of the first publication thereof and the name of the newspaper in which the same is printed: *Hawkins v. Superior Court*, 165 Cal. 743, 134 Pac. 327.

Section 1491a of the Code of Civil Procedure is not merely directory, but is mandatory, and the notice provided for must be filed in the prescribed time; a compliance with the provision of sections 1491 and 1492 alone is not sufficient to entitle a party to a decree establishing due notice to creditors, where the notice prescribed by section 1491a has not been filed in the prescribed time: *Hawkins v. Superior Court*, 165 Cal. 743, 134 Pac. 327. (See page 697.)

**(6) Decree establishing notice.** In the settlement of the estate of a deceased person the court is not authorized to make the decree establishing due notice to creditors provided by section 1492 of the California Code of Civil Pro-



cedure, unless a printed copy of such notice accompanied by a statement setting forth the date of the first publication thereof and the name of the newspaper in which the same is printed, has been filed in court within thirty days after the first publication of the notice as required by section 1491a of that code, enacted in 1911: *Hawkins v. Superior Court of Marin Co.*, 165 Cal. 743, 134 Pac. 327. (See page 698.)

(7) **Order vacating decree.** (See page 699.)

(8) **Decree of no debts.** (See page 699.)

## 2. CLAIMS IN GENERAL.

(1) **Jurisdiction of courts.** The jurisdiction of the superior court, when sitting in a probate proceeding, is that of a court of general jurisdiction; and its order for the payment of the debts of a decedent's estate, as the circumstances may require, is within its jurisdiction, and is part of the settlement of the account; and an objection made after the decree ordering a claim to be paid has become final that it was not presented to the administratrix as required by law comes too late: *L. Harter Co. v. Geisel*, 18 Cal. App. 282, 122 Pac. 1094.

In an action brought under chapter 38, Revised Codes 1905, by the guardian of an infant against the administrator of the estate of the man who had killed the infant's mother, for damages for such killing, it was held that the action would not lie inasmuch as the statute being in derogation of the common law must be strictly construed, and it did not give any right of action against the estate of the tortfeasor: *Willard v. Mohn*, 24 N. Dak. 391. (See page 699.)

(2) **Meaning of terms.** The term claim as used in sections 178 and 180 of the probate court of South Dakota has reference to debts or demands against the decedent which might have been recovered against him in his lifetime by a personal action for the recovery of money only: *Kline v. Gingery*, 25 S. Dak. 18.



Creditors of the estate are persons who are such, or became such, because of dealings with the decedent, and their claims are obligations with which the personal representatives of the decedent had nothing to do originally, and obligations properly incurred in the administration of the estate do not have to be verified as claims against the decedent's estate and paid in due course of administration, but are payable as expenses of the administration in priority over the claims of decedent's creditors: *Garver v. Thoman*, — *Ariz.* —, 135 *Pac.* 725. (See page 700.)

(3) **What is a claim.** Where a check or written order on a bank duly authenticated by the maker, stated: "You are hereby authorized to pay out of the funds I now have in your bank, for a valuable consideration, which I have received, five hundred dollars, to Mrs. Maria Nassano, or her order, prior to my death, if countersigned by me across the back, or on due notification of my death, without such countersignature," and the same was first presented to the bank after the maker's death, and payment thereof was refused, the payee is entitled to recover the amount thereof as a claim against the estate of the maker. In effect there was an obligation that the drawer's estate would pay if the bank refused: *Nassano v. Tuolumne County Bank*, 20 *Cal. App.* 603, 130 *Pac.* 29.

When stock owned by a stockholder in his lifetime has become vested in his estate, the estate is liable as a stockholder for its proportion of indebtedness after his death: *Miller & Lux Inc. v. Katz*, 10 *Cal. App.* 576, 102 *Pac.* 946.

Where a husband agreed with his wife pending divorce proceedings to pay a monthly allowance to a child during minority the obligation continues after his death and is a claim against his estate: *Stone v. Bayley*, — *Wash.* —, 134 *Pac.* 825.

A widow's allowance which she elected to take in money in lieu of the specific property allowed her by the appraisers is a sufficient claim against the estate to support a proceeding to sell the realty to pay debts: *Pinnacle Gold Mining Co. v. Popst*, 54 *Colo.* 451, 131 *Pac.* 418.



The estate of a deceased holder of stock in a corporation is liable upon stock held and owned by him in the same way and to the same extent that he was liable in his lifetime: *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74.

Under a lease made to two or more lessees the estate of one dying is liable for rent accruing after the death and the executors are properly joined with the surviving lessees in an action to recover such rent: *Brownfield v. Holland*, 63 Wash. 86, 114 Pac. 892.

With the exceptions of homesteads set apart and allowances for the family support, all the decedent's estate is equally liable for the payment of debts, the word "debts" including family allowances, expenses of administration, and debts accrued and to accrue: *Plains Land Co. v. Lynch*, 38 Mont. 271, 99 Pac. 850.

The costs and expenses of contesting the probate of a will are not a claim against the estate. The deceased did not incur them nor can they in any sense be his obligations. They are collectible out of his estate simply because the statute makes them so: *In re Statler's Estate*, 58 Wash. 199, 108 Pac. 433.

Under the Colorado statutes the estate of a decedent is primarily liable for a reasonable expense lawfully incurred in the administration and settlement thereof and the county court has jurisdiction to allow directly to the claimant his demand therefor and order the administrator to pay the same, observing of course the statutory classification and requirements in so doing. In contracting for or incurring such expenses the administrator acts for the estate, in his official and not in his private or individual capacity: *U. S. Fidelity & Guarantee Co. v. People*, 44 Colo. 557, 98 Pac. 833.

Estate held liable for special damages accruing prior to decedent's death, from decedent's obstruction of highway: *Leverone v. Weakley*, 155 Cal. 395, 101 Pac. 304.

Upon the death of a stockholder, his estate succeeds to his stock and is liable with the other stockholders for corporate



debts thereafter arising so long as the stock is part of the estate.

Rule applied though executrix never had possession of, or dominion over, stock nor knew of its existence until after creation of indebtedness sued on: *Miller v. Katz*, 10 Cal. App. 576, 102 Pac. 946.

Where a devisee of a building in process of erection, upon the refusal of the executor to make proper expenditures from the estate to insure its preservation, individually pays for the same, such payment must be regarded as voluntary, and the devisee can not recover the amount thereof from the estate: *Estate of Hinchon*, 159 Cal. 755, 116 Pac. 47.

Money so paid, in compliance with what the payer thought to be a contract with the deceased obligating her to do so, in consideration of the deceased giving her a lot with a completed building thereon, will not be deemed a voluntary payment, if the payer, at the time of payment, was ignorant of the facts that the building was uncompleted and that no such deed of gift had been made, and the will directed the funeral expenses to be paid from the estate: *Estate of Hinchon*, 159 Cal. 755, 116 Pac. 47.

Claims for the price of goods purchased by an administrator for the purpose of carrying on the testator's business under order of court are not claims against the estate and the statute of nonclaim does not apply: *Gordon Reduction Co. v. Lorimer*, 50 Colo. 409, 115 Pac. 719. (See page 700.)

#### REFERENCES.

Testamentary libels, see note 49 L. R. A. (N. S.) 897.

(4) **Statement of particulars.** Failure of verified claim to give particulars prescribed by statute held not fatal where claim was accompanied by note and mortgage showing such details: *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312.

Claim for specified sum "& Int." held sufficient to cover interest: *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312. (See page 701.)



(5) **Affidavit of verification.** Where a statute providing for the presentation of claims against an estate requires that the affidavit in support must state among other things that there are no offsets to the claim to the knowledge of claimant a claim not containing that clause is fatally defective: *Dakota National Bank v. Kleinschmidt*, — S. Dak. —, 144 N. W. 936.

A verification of a claim of a corporation by the secretary, reciting that there are no offsets to the claim to the knowledge of the "claimant," instead of to the knowledge of the "affiant," is not fatal to the claim: *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496.

Affidavit that claim was due and unpaid; and that there were no offsets or credits, held not in compliance with Code Civ. Proc., Sec. 1494, requiring statement that amount is justly due, that no payments have been made which are not credited, and that there are no offsets: *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732. (See page 702.)

#### REFERENCES.

As to statement of claims against a decedent, see note in 130 Am. St. 311.

(6) **Claim is good in form when.** Where a claim against an estate is only verified by a notary public and complies with the law in every respect but the claimant failed to subscribe his name thereto such omission is not fatal to its character as an oath: *Tucker v. Tucker*, 21 Colo. App. 94, 121 Pac. 127.

The claim by those who had endorsed testator's notes secured by mortgage for a deficiency paid by them after foreclosure sale is on the notes and not on the judgment in foreclosure and it is not necessary that an exemplification of the judgment should be filed with the claim against the estate of the maker of the notes: *Cone v. Eldridge*, 51 Colo. 564, 119 Pac. 619.

The original notes covering a claim against an estate and not a statement of them must be filed in the probate court



with the claims under the Colorado statute, otherwise the statute of nonclaim runs against the claims: *Gordon Reduction Co. v. Loomer*, 50 Colo. 409, 115 Pac. 719.

The claim against an estate should be clear and convincing as to its existence as well as to the amount of the claim: *De Monco v. Means*, 47 Colo. 457, 107 Pac. 1108.

A claim against the estate of a deceased surety on an administrator's bond is not required to state the facts with all the preciseness of a complaint, and the exact amount of such claim need not be stated where an accounting is pending: *Elizalde v. Murphy*, 163 Cal. 681, 126 Pac. 978. (See page 703.)

(7) **Partnership debt.** A claim *ex contractu* for a partnership debt can not be maintained against the estate of a deceased partner, in the absence of proof of a final settlement between the surviving partner and the estate and on showing that the partnership assets are insufficient to pay the debts: *De Monco v. Means*, 47 Colo. 457, 107 Pac. 1108.

### 3. PRESENTATION OF CLAIMS.

(1) **In general.** That a proper claim against an estate is not drawn with the precision which would render a complaint good against a special demurrer, especially in the absence of a demand for further particulars, is not fatal to its presentation: *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496. (See page 704.)

(2) **Necessity of.** In an action brought by the assignee of a life insurance policy to recover the amount of the policy, the administratrix of the insured's estate having been made a party upon application of the insurance company, it is not necessary that the plaintiff's claims be first presented to the administratrix for allowance: *Haynes v. City Nat. Bank of Lawton*, 30 Okla. 614, 121 Pac. 182.

The fact that an action was pending against one at the time of his death does not dispense with due presentation of the claim against his estate: *First National Bank of Denver v. Hotchkiss*, 49 Colo. 593, 114 Pac. 312.



(3) **Place. Persons to act.** Where there is both principal and an ancillary administration, creditors may prove their claims in either jurisdiction and it is not always necessary that they should be proved in both: *Dow v. Lillie* (N. Dak.), 144 N. W. 1085. (See page 706.)

#### REFERENCES.

Effect of failure to present claim in due time under law of the domicile as a bar to its allowance in the state of the ancillary administration, or vice versa, see note 19 L. R. A. (N. S.) 553, 554.

(4) **Absence from state.** (See page 707.)

(5) **Manner of presentment.** It is not fatal to the presentation of a proper claim against an estate that it is not drawn with the precision which would render a complaint good against a special demurrer, especially in the absence of a demand for further particulars: *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496. (See page 707.)

(6) **Amendment of claims.** (See page 709.)

(7) **What claims must be presented.** A claim arising on contract must be presented to the administrator for allowance or rejection before suit can be maintained thereon, but not so where the claim arises in tort, or other wrongful act of the deceased: *American Trust Co. v. Chitty*, 36 Okla. 479, 129 Pac. 52.

Where a claimant against an estate has a lien but which lien is not of record, he should present his claim to an administrator before attempting to foreclose: *Brown v. Truax*, 58 Or. 572, 115 Pac. 598. (See page 709.)

(8) **"Contingent claims."** The amount due on a building contract made by a decedent, whether accrued or contingent, is a proper subject of claim against his estate, but the demand, if not presented as a claim within the time limited, is barred, and no action thereon can be maintained, in the absence of such presentation. Neither he nor a devisee of the building who has assumed to pay for its completion



can compel the executor to pay such demand: *Estate of Hincheon*, 159 Cal. 755, 116 Pac. 47. (See page 710.)

**(9) Claims of executor or administrator.** Under the provisions of section 1510, Code of Civil Procedure, construed with sections 1490 and 1493 of the same code, the claim of an administrator upon a promissory note, as a creditor of the estate, must be presented to the judge for allowance within the time provided for the presentation of the claims of other creditors against the estate, and, if presented after the expiration of that time, it is barred forever under the terms of the code; and the claim was properly rejected by the judge: *Estate of Long*, 9 Cal. App. 754, 100 Pac. 892. (See page 712.)

**(10) What claims need not be presented.** It is not necessary that a claim by an executor or administrator for his own compensation and the necessary expenses of administration should be presented against the estate, as they are preferential claims and may be retained in the administrator's hands: *In re Murray's Estate*, 56 Or. 132, 107 Pac. 21.

Where, before decedent's death, execution was levied on debts due him, judgment creditor had lien within Code of Civil Procedure, Sec. 1500, excepting demands secured by lien from necessity of presentation: *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 100 Pac. 242.

Presentation of claims, arising against an estate after decedent's death, for allowance, is unnecessary. Rule applied to liability of estate as stockholder for corporate debts: *Miller v. Katz*, 10 Cal. App. 576, 102 Pac. 946.

The claim under an agreement to bequeath not less than one-third of an entire estate is not such a demand as must be presented against the estate within the period limited by the statute of nonclaim: *Oles v. Wilson*, — Colo. —, 141 Pac. 492. (See page 712.)

**(11) Same. Vendor's lien.** (See page 713.)

**(12) Same. Specific property.** (See page 714.)



**(13) Effect of presentment.** Presentation of a claim to an administrator does not of itself operate as a waiver of a lien upon the estate of the decedent: *Castle Estate v. Huneberg*, 20 Haw. 123.

Ward's presentation of claims against guardian's executors for funds converted by guardian held not to affect their right to recover against executors, though changing their remedy: *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. (See page 715.)

**(14) Effect of nonpresentment.** A promise by executors who were also sole devisees and legatees to pay a note on which their testator was an indorser did not estop them to rely on nonpresentation of the claim as a defense, since they could not by their promise estop creditors whose rights might be adversely affected, especially where the claimant did not rely upon the promise, but attempted to present his claim in a legal way: *Seattle Nat. Bank v. Dickinson*, — Wash. —, 130 Pac. 374.

The failure to present the claim to the executor or administrator in due manner and time defeats the right to a mechanic's lien on the property: *Crowe Co. v. Adkinson Co.*, 67 Wash. 420, 121 Pac. 842.

The failure to present a claim in time does not go to the jurisdiction of the court to direct its payment upon final settlement of the account. It is only matter of error to be corrected on appeal, and it can not be otherwise objected to, in the absence of fraud or collusion, which has not been here alleged or claimed. If not legitimately assailed, the order settling the final account and directing payment of the claim is conclusive upon all persons interested in the estate, whether heirs, legatees, or creditors: *L. Harter Co. v. Geisel*, 18 Cal. App. 282, 122 Pac. 1094. (See page 714.)

**(15) Effect of death.** (See page 716.)

**(16) Presentation after death.** (See page 717.)

**(17) Claim of judge.** In view of the special provision made in section 1495 of the Code of Civil Procedure as to Probate Sup. 15.



the mode of the allowance of a claim against the estate of a deceased person in favor of the judge, it is to be considered that he is not generally disqualified to sit in any matter of the estate which has no reference to his interest as a creditor: *Regents etc. v. Turner*, 159 Cal. 541, 114 Pac. 842.

#### 4. ALLOWANCE AND REJECTION OF CLAIMS.

(1) **In general.** An executor or administrator has no authority to settle and pay a claim of more than \$50 against the estate of the deceased without an allowance by the probate court, nor is he authorized to bind the estate by an offer to confess judgment for such claim, or an admission of liability therein, and if he does make such an offer or admission it is not competent evidence against the estate in an action on the claim: *Wright v. Stage*, 86 Kan. 475, 121 Pac. 491. (See page 718.)

(2) **Passing on claims. In general.** (See page 719.)

(3) **Same. Rejection of claims.** In allowing or rejecting a claim against an estate an administrator acts merely as an auditor and his refusal to allow such claim is not *res adjudicata*: *Dow v. Lillie* (N. Dak.), 144 N. W. 1085.

Where a claim has been disallowed by an executor the claimant's remedy is to present it to the county court for allowance, and the question of its allowance would have been tried thereafter as a law action under Sec. 1241 L. O. L.: *Irvine v. Beck*, 62 Or. 593, 125 Pac. 834. (See page 720.)

(4) **Right to consider claim rejected.** The allowance of a claim by the executor and judge for a portion of the amount for which it was presented, and its subsequent filing by the claimant with the clerk of the court, does not constitute conclusive evidence of acceptance by the claimant of the part allowed in full satisfaction of his debt, or operate as a bar to a suit to recover the whole claim: *Haub v. Leggett*, 160 Cal. 491, 117 Pac. 556.

The creditor may treat a partial allowance by the executor as a rejection of the entire claim and may bring his suit at



once without presenting it to the judge at all. But there is nothing in the statute which makes this the only mode of procedure or which declares that he can not sue for the whole, if he first presents it to the judge and files it with the papers after the judge has approved the partial allowance of the executor: *Haub v. Leggett*, 160 Cal. 491, 117 Pac. 556.

If the creditor sues for the entire demand, giving no credit for the part allowed, the executor or administrator can set up the allowance in the answer, and the record will then necessarily show whether the judgment given is for the whole claim, or for the balance only. If it is for the whole, the allowance formerly made will be merged in such judgment. If for the balance, only, the former allowance will stand: *Haub v. Leggett*, 160 Cal. 491, 117 Pac. 556. (See page 720.)

**(5) Power of court and judge.** (See page 721.)

**(6) Filing of claim.** A claim which has been rejected by the administrator need not be reported by him to or filed by him in the probate court. It is only claims which have been allowed which must be filed in the probate court: *Chandler v. Probate Court*, — *Ida.* —, 141 Pac. 637. (See page 722.)

**(7) Defective verification.** (See page 723.)

**(8) Amendment of claim.** If by inadvertence a demand against the estate of a decedent was assigned to a lower class than that to which it rightfully belonged the probate court has jurisdiction to correct the error even at a subsequent term, and justice required such correction to be made, upon due application and notice: *Commercial State Bank of Waverly v. Ross*, 90 Kan. 433, 133 Pac. 539. (See page 723.)

**(9) Objections to allowance.** When claims are pending against an estate before the probate court upon an order setting aside their former allowance by the administrator and the probate judge, upon objections by the heirs, the probate judge is not required to indorse upon said claims his



allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due: *McElroy v. Whitney*, 24 Ida. 210, 133 Pac. 118.

The order or judgment of a probate judge allowing a claim against an estate upon an *ex parte* showing is not a final order or judgment which binds or affects the heirs of such estate, who have not appeared, objected to, or contested such claim: *In re Coryell's Estate*, 16 Ida. 201, 101 Pac. 724.

The statutes of the state of Idaho give an heir the right to appear and contest a claim after its allowance by the administrator and the probate judge, and such heir is not concluded by the order or judgment of allowance made in the first instance: *In re Coryell's Estate*, 16 Ida. 201, 101 Pac. 624. (See page 726.)

**(13) Arbitration. Reference.** (See page 726.)

**(14) Claims properly allowed.** The burden to show that a claim was not properly allowed is on contestant: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

Same rule applies in action by representative to enforce his own approved claim: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. (See page 727.)

**(15) Claims that will be rejected.** Where a claim against an estate is not properly exhibited to the court in compliance with the provisions of the statute in that behalf within one year from the granting of letters of administration its allowance by the court is reversible error: *Alvater v. First Nat. Bank*, 45 Colo. 528, 103 Pac. 379.

Where the executor fraudulently used a power of attorney given to him by decedent while he was lying ill near death, which contains no power to execute a note, to execute his note to himself, and then transferred the same to his sister-in-law, so as to include a large amount of interest added to his debt to her, and then approved the same as a claim against the estate, the case is clearly one of fraud



upon the estate: *In re Newell*, 18 Cal. App. 258, 122 Pac. 1099. (See page 728.)

(16) **Claim of executor or administrator.** (See page 728.)

(17) **Absence from state.** When decedent bought goods from plaintiff in New York, and after six months' absence from the state died one year and twenty-three days from the purchase, without payment, and her executrix received a verified claim for the amount due one month later, and thirteen days before issuance of letters testamentary, and retained the same one year and twenty-eight days thereafter and then rejected the claim as barred in two years from the purchase, an averment in the complaint, filed three months after such rejection, setting up the six months' absence from the state, to take the case out of the statute of limitations, did not show a change of the cause of action on the rejected claim and the court erred in applying the rule that because the facts pleaded were not set forth in the claim, the plaintiff can not recover upon any cause of action not stated therein and in giving judgment for the estate: *Scott, Stamp & Co. v. Leake*, 9 Cal. App. 511, 99 Pac. 731. (See page 729.)

(18) **Judgments.** Where the surety on an appeal bond of the deceased pays the amount, on dismissal of the appeal, and files a claim therefor against the estate, such claim is not on a judgment within Rev. Stats. 1908, Sec. 7212, requiring such a claim to be exhibited by filing an exemplification of the record: *German Am. Trust Co. v. National Surety Co.*, 55 Colo. 499, 136 Pac. 457. (See page 729.)

(19) **Contingent claims.** That the amount of the liability of a stockholder for corporate debts had not been determined in an action against him did not on revival after his death render the claim a contingent one not presentable until its amount was determined: *First Nat. Bank of Denver v. Hotchkiss*, 49 Colo. 593, 114 Pac. 312. (See page 729.)

(20) **Interest.** Allowance with interest up to the time of the allowance does not preclude the recovery of interest



after that time: *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312. (See page 730.)

**(21) Contest of claims. Vacating allowance.** (See page 731.)

## 5. SUITS ON CLAIMS.

**(1) In general.** In an action against an estate upon a rejected claim the plaintiff can not recover upon any other cause of action than the one set up in the claim which has been presented and rejected: *Bechtel v. Chase*, 156 Cal. 707, 106 Pac. 81.

An action required to be brought under the provisions of section 5468, Revised Codes 1909, of Idaho to recover a rejected claim, if it is a demand for money, is an action at law and the rejection of the same by the administrator does not change the character of the claim or of the action required to be brought: *Idaho Trust Co. v. Miller*, 16 Ida. 308, 102 Pac. 360. (See page 732.)

**(2) Jurisdiction.** (See page 733.)

**(3) Presentation, when necessary.** (See page 733.)

**(4) No presentation necessary, when.** A claim for damages against the estate of a deceased person, for special injury caused by the destruction of a public highway maintained by the deceased up to the time of his death, does not arise upon contract, and need not be presented to his personal representative prior to the bringing of suit thereon: *Leverone v. Weakley*, 155 Cal. 395, 101 Pac. 304. (See page 735.)

**(5) Contingent claims.** (See page 736.)

**(6) Services.** Evidence that a testator desired to make payment for services rendered him by a nurse during his last illness, and to that end left her a legacy, which failed because she became a witness to the will, coupled with evidence that the nurse performed the services in the expectation of receiving compensation after the death of the testa-



tor, is sufficient to support a claim of the nurse for the reasonable value of her services: *Estate of Rohrer*, 160 Cal. 574, 117 Pac. 672.

Where father and son made an oral agreement that if the son would take care of the father and his wife (the son's mother) and manage his ranch so long as the father and mother should live, he would leave the ranch to his son at his death and a will was made accordingly and the son performed his part of the agreement but later, after the death of his wife, the father sold the ranch and left the state and afterwards died, and his will had disappeared, it was held that the son had a claim on quantum meruit against the father's estate for the value of his services: *Pool v. Pool*, — Wyo. —, 133 Pac. 374.

As a general rule a child who is living with its parents is not entitled to compensation for services rendered to the parent, even though the child be an adult or otherwise emancipated, for such services are presumed to be gratuitous, and a promise on the part of the parent to pay for them will not be implied from their mere rendition. But if from all the facts and circumstances surrounding the parties and under which the services were rendered, it can be reasonably inferred that the child expected to receive remuneration and the parent intended to pay for the services, a promise to pay therefor may be implied: *Mathias v. Tingey*, 39 Utah 561, 118 Pac. 782.

Where in proceedings to establish a claim against a decedent's estate for services rendered the evidence of the quality and amount of the service are indefinite and there is no evidence of the value of the services no part of the claim should be allowed: *Carl v. Northcott*, 48 Colo. 47, 108 Pac. 994.

Under an oral agreement a girl was received into the home of decedent to live with and work for him until the death of himself and wife, in consideration of which she was to receive the property of decedent at his death. In execution of this agreement she faithfully served decedent for twenty-two and one-half years and until her discharge a few years



before his death, when he paid her \$200 on account and at the same time fraudulently induced her to sign a receipt containing a provision of which she was not aware acknowledging payment in full of all debts and demands, and when he died it was found that no provision had been made by will or otherwise to compensate her for her services under the agreement. Held (1) That the contract though not in writing was enforceable. (2) That as performance of the contract was to be completed and compensation paid at the death of decedent and his wife the statute of limitations would not ordinarily begin to run on her cause of action for her services until that event transpired. The fact that there was a renunciation of the contract by the decedent before his death did not compel her to end the contract relation. She was at liberty to keep the contract alive and await the time for final performance specified therein: *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846.

All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them, and should he die his executor is not liable in an action for the breach of contract occasioned by his death: *Mendenhall v. Davis*, 52 Wash. 169, 100 Pac. 338.

Evidence held sufficient to sustain finding of no implied contract to pay for care and support of mother: *Crane v. Derrick*, 157 Cal. 667, 109 Pac. 31.

The fact that the nurse was the wife of a nephew of the deceased, and that she and her husband resided in the home of the deceased during the time the services were rendered, raises no presumption that the services were gratuitous: *Estate of Rohrer*, 160 Cal. 574, 117 Pac. 672.

A contract for personal services did not require the performance by the grantee, personally and individually, of the obligations to occupy, cultivate, and improve the land, within the meaning of the rule that contracts to perform personal acts are discharged by the death or disability of the person who was to perform the acts. That rule does not apply where the services are of such a character that



they may be as well performed by others, nor where the contract by its terms shows that performance by others was contemplated. The obligations to occupy, cultivate, and improve the land and to pay the stipulated annual amount could be performed by the surviving members of the family of the grantee. This construction of the contract finds support in the fact that for several years after the death of the grantee the grantor accepted such payments from them: *Husheon v. Kelley*, 162 Cal. 656, 124 Pac. 231. (See page 736.)

**(7) Pleadings. Sufficiency of complaint.** Where a sufficient claim was presented by plaintiff against the estate of the deceased trustee for the amount of the trust fund, and was rejected and a sufficient cause of action to enforce the same was set forth in an amended complaint which reveals nothing inconsistent with the acknowledgment of the trust and shows no laches on the part of the plaintiff, the court erred in sustaining a demurrer thereto and entering judgment for the defendant, and it must be reversed with directions to overrule the demurrer: *Fleming v. Shay*, 19 Cal. App. 276, 125 Pac. 761.

Where a rejected claim of a daughter was "for services as nurse for 204 days" between certain dates "at \$2.50 per day, \$510," and the complaint therein alleged services between said dates "as nurse to Mary J. James, at her request and for her use and benefit, performing at such time and times in said capacity of a nurse all the duties of a nurse, including the cooking, housekeeping, laundering and caring for the said Mary J. James, during her last illness, which services were and are reasonably worth the sum of \$2.50 per day," it is held that the duties of a nurse do not include the particular services specified, but that, in the absence of a demurrer for uncertainty, and in view of the admission of defendant and the finding of the court that her services as a nurse were worth \$2.50 per day, during the time claimed, the complaint may be construed as so asserting: *Wood v. James*, 15 Cal. App. 253, 114 Pac. 387.



Mills' Ann. Stats. 1912, Sec. 8002 (Rev. Stats. 1908, Sec. 7212) makes formal pleadings in probate matters unnecessary, so a claim against an estate that decedent "held in trust and converted the sum of \$2000, credit \$500 paid on account, balance \$1500," was sufficient: *Brown's Estate v. Stair*, — Colo. —, 136 Pac. —.

A complaint, in an action against an executor on a promissory note executed by the decedent, which alleges the non-payment of the original obligation and its due presentation to and rejection by the executor, sufficiently states a cause of action, and it is not necessary to further aver that the executor has not paid the claim: *Nicol Co. v. Cameron*, 23 Cal. App. 124, 137 Pac. 270.

The claim sued upon against the estate was properly admitted in evidence over the objection of the defendant. It was not necessary that such claim should show on its face that it is not barred by the statute of limitations; and in so far as the objection was directed to the formal sufficiency of the claim, its general rejection in the first instance, without special reason assigned, must be deemed a waiver of any formal defects therein: *E. Martin & Co. v. Brosnan*, 18 Cal. App. 477, 123 Pac. 550. (See page 738.)

**(8) Pleadings. Allegation as to presentation of claim.** (See page 739.)

**(9) Pleadings. Amendment of complaint.** (See page 740.)

**(10) Pleadings. Answer. Bill of particulars.** (See page 741.)

**(11) Pleadings. Variance.** Section 7529, Revised Codes of Montana, provides that if a claim against an estate in probate be founded upon a bond, bill, note, or other instrument, a copy thereof must accompany the claim and the original must be exhibited if demanded, unless it be lost or destroyed, in which case the claim must be accompanied by an affidavit containing a copy or particular description of the instrument, so that where the claim as presented was



on an open account for money loaned and was rejected and suit was afterward brought for the same claim as on a note, a copy thereof being set out in the complaint, it was held that there was a fatal variance and the statutes of non-claim could be successfully set up as a defense to the action: *Vanderpool v. Vanderpool*, — Mont. —, 138 Pac. 773.

Under Code of Civil Procedure, section 1500, requiring presentation of claims to representatives, actions against estate must be on same cause of action set up in rejected claim: *Bechtel v. Chase*, 156 Cal. 707, 106 Pac. 81.

Plaintiff who had filed claim for goods sold held not entitled to amend at trial so as to authorize recovery for fraud inducing exchange of property: *Bechtel v. Chase*, 156 Cal. 707, 106 Pac. 81.

Where complaint for services was on quantum meruit, while proof was express contract, variance was fatal: *Eidinger v. Swigart*, 13 Cal. App. 667, 110 Pac. 521. (See page 742.)

**(12) Parties. Administrator, only, is necessary when.** An administrator of a co-surety may be joined as defendant with the surviving sureties in an action on an indemnity bond: *City of Spokane v. Costello*, 57 Wash. 183, 106 Pac. 767.

Joinder of heirs is not necessary in action against executrix to enforce liability of estate as stockholder, such liability being contractual, within Code Civ. Proc., Sec. 1532, providing that actions founded on contract may be enforced against representative where they might have been maintained against decedent: *Miller v. Katz*, 10 Cal. App. 576, 102 Pac. 946. (See page 742.)

**(13) Evidence. In general.** In an action on a rejected claim against the estate of a deceased person, where the administratrix of the estate was called as a witness for the plaintiff, was examined and cross-examined without objection to her testimony as a whole, the defendant can not be heard to complain, after the witness has left the stand, that



her evidence was objectionable as a whole, and a motion then made to strike out all of her evidence, not based upon any valid objection previously stated, was properly denied: *E. Martin & Co. v. Brosnan*, 18 Cal. App. 477, 123 Pac. 550.

In an action on a claim of \$5000 alleged to be due from the estate of a decedent on account of profits made in the purchase by him of property as plaintiff's agent, where interested witnesses testified to the claim, though they were presumed to speak the truth, yet where there was evidence before the jury, upon which to determine the weight to be given to their testimony, the jury was entitled to consider their motives and interests, and the conduct of the plaintiff in failing to speak when the circumstances required in good faith he should do so and even entitled to discredit their testimony and to find against the existence of any agency, though there was no direct testimony in conflict with such witnesses: *Sterling v. Cole*, 12 Cal. App. 93, 106 Pac. 602.

In an action on a note against an executor of a deceased testator, the testimony of disinterested witnesses familiar with his handwriting, that the note was in his handwriting, is sufficient to support a verdict against the executor for the full amount of the note: *Rooker v. Samuels*, 10 Cal. App. 227, 101 Pac. 689.

Under the provisions of the Probate Code of South Dakota no action can be maintained against an executor or administrator upon a claim against the estate of the decedent until the claim has been first presented to and rejected by the administrator. Where an action was brought upon a claim which was filed in the proceedings and endorsed, "The within claim presented to Garrett F. Johnson, administrator of the estate of said deceased, is rejected this 26th day of July, 1910. Garrett F. Johnson. Filed Aug. 2, 1910," but no proof of the signature of the administrator to the rejection was offered. The claim was offered in evidence as part of the records of the court. The Probate Code required that allowed claims must be filed but not rejected ones. A rejected claim is therefore not, in contemplation of law, a record of the probate court and it was held that the



trial court erred in admitting the claim in evidence without proof of the purported signature of the administrator thereon: *Murray v. Johnson*, 28 S. Dak. 572.

Where it appeared by plaintiff's complaint and summons and proof of the date of service thereof that the action was brought more than ninety days after the claim had been rejected by the administrator, it is held that the necessity of proving the presentation and rejection of a claim against a decedent's estate and of a suit begun within ninety days from such rejection, is upon plaintiff, as a part of the proof of his cause of action, and this without regard to whether the defendant has answered pleading the statute of non-claim: *Mann v. Redman* (N. Dak.), 145 N. W. 1032.

Though under section 8028 of the Revised Codes of Montana the evidence is to be weighed not only according to its own merits but also according to the power of the one side to produce and the other to refute, an action on a claim against a decedent's estate is governed by the ordinary rules of evidence and procedure: *Ganss v. Trump*, 48 Mont. 92, 135 Pac. 912.

The statute of Oregon (L. O. L., Sec. 1241) requires that no demand upon a decedent's estate that has been rejected by an administrator or executor shall be allowed by any court or jury except upon some competent or satisfactory evidence other than the testimony of the claimants: *In re Lucke's Estate* (*Consort v. Andrew*), 61 Or. 483, 123 Pac. 48.

A claim against a decedent's estate should be supported by stronger evidence than admissions to third persons: *Anderson v. Osborn*, 62 Wash. 400, 114 Pac. 161.

Where the answer affirmatively admitted the presentation and rejection of the claim, no evidence thereof is required, but it is sufficient for the plaintiff to show that the action thereon is founded upon the same claim which was presented to the defendant for allowance: *E. Martin & Co. v. Brosnan*, 18 Cal. App. 477, 123 Pac. 550.

It is held that the evidence for the plaintiff is amply sufficient to support the verdict, and that, as there was no coun-



ter evidence for the defendant, a motion for a nonsuit of the plaintiff was properly denied: *E. Martin & Co. v. Brosnan*, 18 Cal. App. 477, 123 Pac. 550. (See page 742.)

**(14) Evidence. Presentation. Payment. Burden.** (See page 744.)

**(15) Evidence. Plaintiff's statutory inability to testify.** An officer or stockholder of a corporation plaintiff in an action on a claim against a decedent's estate defended by the administrator is "a party interested in the event" so as to preclude him from testifying for the plaintiff under Rev. Stats. 1908 of Colorado, Sec. 7267: *Gilmour v. Hawley Merchandise Co.*, 21 Colo. App. 301, 121 Pac. 766; *Same v. First Nat. Bank of Central City*, 21 Colo. App. 301, 121 Pac. 767.

Under the Utah statute a party plaintiff is not a competent witness in his own behalf as to "any statement by or transaction with" the deceased "or matters of fact whatever which must have been equally within the knowledge of both" the plaintiff and the deceased: *Kislingbury v. Evans*, 40 Utah 356, 121 Pac. 671. (See page 745.)

**(16) Evidence. Admission of decedent.** Where plaintiff suing the estate of a decedent for money advanced and services rendered was the timekeeper and bookkeeper of the deceased and in such capacity kept a journal containing entries, seemingly made in the usual course of business, it is the book of the principal and admissible to show the plaintiff's account: *Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 885.

In an action against executors for services rendered testator, where the executors set up a contract and performance of the deceased, testator's declaration to a third and uninterested party, that plaintiff had rendered services but that there was no agreement as to the amount to be paid therefor was admissible in plaintiff's behalf: *Wright v. State*, 83 Kan. 445, 111 Pac. 467.



An instrument dated and signed by a person since deceased, stating that he has a certain amount of money on deposit at a named bank which at his death he wishes paid to a designated person "for kindness she has shown me during my lifetime, and she is to pay all my funeral expenses and just debts," does not amount to an account stated: *Outwaters v. Brownlee*, 17 Cal. App. 145, 135 Pac. 300.

Such an instrument is not admissible as evidence, in an action against the administrator of the estate of the deceased to recover for services rendered to him, of an intention on his part to any certain amount; it can do no more than indicate an intention to pay the reasonable value of the services performed: *Outwaters v. Brownlee*, 17 Cal. App. 145, 135 Pac. 300.

A finding as to an express contract of the sick mother, in this case, to pay her daughter for her services as nurse, is sufficiently supported by evidence that when the mother became afflicted with paralysis she requested her neighbor to call a doctor and a nurse, and the daughter, who lived in another county, was sent for, as a nurse, and after she came the mother told the neighbor to request her to remain and she would pay her for her services, and she remained and served as a nurse until her mother's death: *Wood v. James*, 15 Cal. App. 253, 114 Pac. 587.

It is no objection to such finding that the evidence shows no direct contract between the daughter and her mother, as no such evidence is admissible under section 1880 of the Code of Civil Procedure, which closes the lips of the plaintiff, and does not permit her to testify thereto: *Wood v. James*, 15 Cal. App. 253, 114 Pac. 587.

It is held that no suspicion can arise as to the claim of the daughter for her services as a nurse to her mother under the facts appearing; and it must be presumed that any unknown circumstances, not disclosed by the record, were such as supported the fairness of the contract, and repelled any suspicion of its not having been made in good faith: *Wood v. James*, 15 Cal. App. 253, 114 Pac. 587. (See page 746.)

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(17) **Interest.** (See page 746.)

(18) **Set-off. Counterclaim.** In an action brought by an executor or administrator, a demand against the estate may be offset to the extent of plaintiff's recovery, without presentation, under section 2531 Pierce's Code (Ballinger's Ann. Codes and Stats., Sec. 6226) of the state of Washington: *Mendenhall v. Davis*, 52 Wash. 169, 100 Pac. 339. (See page 746.)

(19) **Findings. Recovery of costs.** (See page 747.)

(20) **Refusal of offer to settle.** Where plaintiffs could not under any circumstances be entitled to a judgment different from that which defendant as administrator offered them they can not complain that their action was dismissed on their refusal to accept the offer: *First Nat. Bank of Denver v. Hotchkiss*, 49 Colo. 593, 114 Pac. 312.

(21) **Who may defend.** The assignee of an heir has sufficient interest in an estate to entitle him to intervene and defend against a claim against the estate: *Gordon Reduction Co. v. Loomer*, 50 Colo. 409, 115 Pac. 718.

## 6. LIMITATIONS OF ACTIONS. SPECIAL STATUTES OF LIMITATION.

(1) **In general.** (See page 747.)

(2) **Application of statutes. Special and general.** The fact that no order for publication of notice to creditors to present their claims had been made and no such had ever been published does not prevent the running of the three months' limitation of time to bring action after rejection of claim where the claim was presented and rejected without any publication of notice to creditors to present claims: *Singer & Co. v. Austin*, 19 N. Dak. 548.

In a proceeding to foreclose a mortgage or in any action asserting an original specific and absolute charge on the land, commenced in the courts of the Indian Territory prior to statehood, the plea of the statute of non-claim is not



available: *International etc. Co. v. Tolbert*, 28 Okla. 595, 115 Pac. 601.

A creditor though empowered to do so is under no obligation to apply for letters of administration of his deceased debtor's estate and in the event of his not doing so statutes of limitation do not begin to run against him until after an administrator shall have been appointed: *Robertson v. Tarry*, 83 Kan. 716, 112 Pac. 603.

Under the provisions of Sec. 5468, Rev. Codes 1909 of Idaho, where a claim has been presented to an administrator and rejected by him, the holder must bring suit in the proper court against such administrator within three months after the date of its rejection if it then be due, or within two months after it becomes due; otherwise the claim is forever barred: *Idaho Trust Co. v. Miller*, 16 Ida. 308, 102 Pac. 360.

The limitation of one year after the issuance of letters of administration for filing claims against the estate of a decedent as provided in Sec. 4780, Mills' Ann. Stats. of Colorado, applies only to those debts or demands which were incurred by the decedent in his lifetime: *U. S. Fidelity & Guarantee Co. v. People*, 44 Colo. 557, 98 Pac. 834. (See page 748.)

**(3) Barred claims not to be allowed. Exception.** (See page 749.)

**(4) Suits to be commenced when.** (See page 750.)

**(5) Statute commences to run when.** (See page 751.)

**(6) Arrest, staying, or suspension of statute.** The mere filing of a claim against an estate does not arrest the running of the general statute of limitations in the state of Colorado: *Alvater v. First Nat. Bank*, 45 Colo. 528, 103 Pac. 379.

Whenever a person desiring to establish a demand against an estate delivers to the administrator a written notice containing a copy of the instrument or account on which it is



founded, and stating that he will present it for allowance to the probate court at a time named, an action on the claim is deemed to be begun so as to stop the running of the statute of limitations. It is not necessary that the controversy shall be decided, or that it shall be submitted for decision before the expiration of the period of limitation, or even that the day first set for a hearing shall fall within that period: *Clifton v. Menser*, 79 Kan. 655, 100 Pac. 644. (See page 752.)

(7) **Revival of actions. Waiver of statute.** A plea of the statute of limitations can not be waived or omitted by an executor and neither can he waive the bar of the statute of non-claim as against the estate: *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 397. (See page 752.)

(8) **Action is not barred when.** If a party makes an attempt to present a claim to an administrator, or executor for allowance, but for some cause fails to properly do so, he is not estopped from presenting it in due form if within the proper time: *Patrick v. Austin*, 20 N. Dak. 267. (See page 753.)

(9) **Action is barred when.** (See page 755.)

(10) **Pleading. Defense.** In an action by a lessor against the administrator of the estate of the lessee for damages for nonperformance of the terms of the lease the complaint set up the presentation of the claim and its rejection. Demurrer was interposed on the ground that the action was not brought within the time limited by the statute of non-claim, viz.: Secs. 8103 and 8105 of the Rev. Codes of the state of North Dakota 1905. Plaintiff moved to strike the demurrer out as "sham and frivolous" and for judgment. Defendant also moved to strike out the complaint and for dismissal of action. The court ordered the demurrer stricken out and gave the defendant leave to answer on any issues other than the statute of limitations. The defendant appealed. The court granted the appeal, giving the defendant leave to set up the defense of the statute of non-claim: *Marion v. Redmon*, 23 N. Dak. 508. (See page 756.)



## 7. JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR.

(1) **In general.** A judgment against an administrator as administrator is against the estate of the deceased and not against the administrator personally: *Collier v. Gannon*, — Okla. —, 137 Pac. 1179. (See page 756.)

(2) **Default. Amendment.** (See page 757.)

(3) **Form of judgment.** Where a judgment against an administrator is that the plaintiff "have and recover" from him, it is not reversible error, but the judgment may be corrected so as to require payment "in due course of administration": *Gauss v. Trump*, 48 Mont. 92, 135 Pac. 913.

Where an action against an administrator was not brought within the year provided for the exhibition of claims, the satisfaction of the judgment was properly limited to decedent's uninventoried estate: *First National Bank of Denver v. Hotchkiss*, 49 Colo. 593, 114 Pac. 312.

A judgment against the executrix upon a demand against the estate of her testator should have been made payable in due course of administration. (See Code Civ. Proc., Sec. 1504): *Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 14. (See page 757.)

(4) **Recovery. Costs.** Under Sec. 124, p. 518 of the Session Laws of 1903 (Colorado), a successful claimant against an estate of a deceased person is entitled to his costs incurred in establishing the validity of his claim: *Brown v. First National Bank*, 49 Colo. 393, 113 Pac. 486. (See page 758.)

(5) **Effect of judgment.** In actions to establish rejected claims against estates, the heirs, legatees, and devisees are not concluded by the judgment obtained against the executor or administrator, but may contest the validity of the claim after it has been thus judicially established: *Estate of Hellicr*, 17 Cal. App. 729 (Adv. Stats.) (See page 759.)



(6) **Execution.** Where a statute inhibits an execution to issue upon a judgment rendered on a claim filed against an estate the violation of such inhibition does not justify the reversal of the judgment but same will be amended by striking out the part awarding the execution: *Stratton's Estate v. Finnerty*, — Colo. —, 140 Pac. 797. (See page 760.)

## 8. ENFORCEMENT OF CLAIMS AGAINST ESTATES.

(1) **In general.** Where will directed payment of his debts out of personalty so far as it would go, creditor could not subject realty in another state without showing that personalty had been exhausted, Civil Code, Sec. 1359 requiring testamentary directions in such regard to be observed: *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732. (See page 761.)

(2) **By attachment.** (See page 762.)

## 9. ACTION PENDING AGAINST DECEDENT AT TIME OF HIS DEATH. PRESENTATION OF CLAIM. (See page 763.)

(1) **In general.** (See page 763.)

(2) **Practice. Substitution. Supplemental complaint.**  
(See page 764.)

## 10. DEATH OF ONE AGAINST WHOM RIGHT OF ACTION EXISTS.

(1) **Right of action preserved.** (See page 766.)

(2) **Effect of, as to statute of limitations.** (See page 767.)

## 11. FORECLOSURE OF MORTGAGE.

(1) **Presentation of claim. Purpose of.** While it is not necessary under Sec. 5277, Comp. Law of Oklahoma 1909, for any one who holds an indebtedness against the estate of a deceased person, secured by a mortgage, to present his claim to an administrator before bringing suit to foreclose,



in order to recover against the estate of decedent for any deficiency there may have been on sale of the mortgaged premises the claim must have been presented to the administrator as required by law in the case of unsecured debts: *Fawcett v. McGahan-McKee Lumber Co.*, 39 Okla. 68, 134 Pac. 388. (See page 768.)

**(2) Presentation. When necessary.** (See page 769.)

**(3) Presentation. When not necessary.** A surety who obtains an indemnity mortgage from his principal may foreclose the mortgage after the death of the principal, though he does not file a claim with the administrator: *McDonald v. O'Shea*, 58 Wash. 169, 108 Pac. 439. (See page 769.)

**(4) Distinct proceedings.** (See page 770.)

**(5) Presentation. Form of.** (See page 771.)

**(6) Pleadings. Parties.** (See page 772.)

**(7) Presentation. Failure to present.** Where a mortgage executed by the deceased in his lifetime was two years past due at his death, and after the appointment of an administrator and notice to creditors, the mortgage note was presented as a claim, but the mortgage was not presented, the statute of limitations as to the mortgage was not suspended, and where the administrator died eight years after his appointment the mortgage was barred before his death, and such bar could not be affected by the subsequent appointment of an administrator of any proceedings attempted by the mortgagee after such appointment: *Regents etc. v. Turner*, 159 Cal. 541, 114 Pac. 842. (See page 773.)

**(8) Effect of allowance. Right to foreclose.** (See page 773.)

**(9) Judgment. Interest.** (See page 774.)

**(10) Sale. Holder as purchaser.** (See page 775.)

**(11) Redemption. Surplus.** (See page 775.)



**12. FORECLOSURE OF MORTGAGES. LIMITATIONS OF ACTIONS. (See page 775.)**

**(1) In general. (See page 775.)**

**13. FORECLOSURE OF MORTGAGES. DEATH OF MORTGAGOR.**

**(1) In general. (See page 777.)**

**(2) Enforcement without presentation.** Where a mortgage lien was created by the testatrix herself to secure her own debt, it is to be paid, as between executors, devisees, legatees, and heirs, in the same manner as the general unsecured debts of the deceased, in so far as concerns the question from what property it is to be paid, unless the will discloses a different intent. And it is immaterial that the mortgagee does not present his claim, but relies entirely on the future enforcement of his lien against the specific property mortgaged: *Estate of DeBernal*, 165 Cal. 223, 131 Pac. 375.

Where husband and wife mortgaged homestead, mortgagee, after death of both, could foreclose without presenting claim against wife's estate, husband having died first and claim having been presented against his estate and allowed: *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312.

Want of administration does not suspend the running of limitations against a mortgage in favor of the estate: *Sanford v. Bergin*, 156 Cal. 43, 103 Pac. 333. (See page 777.)

**(3) Express waiver in complaint. (See page 778.)**

**(4) Limitation of actions. In general. (See page 778.)**

**(5) Limitation of actions. Death before maturity. (See page 779.)**

**(6) Limitation of actions. Death of defendant pending action. (See page 779.)**

**(7) Redemption. (See page 780.)**



**14. MORTGAGES ON HOMESTEADS.**

- (1) In general. Parties to foreclosure.** (See page 780.)
- (2) Presentation of claim. When necessary.** (See page 780.)
- (3) Presentation of claim. When not necessary.** (See page 781.)
- (4) Limitation of actions.** (See page 782.)

**15. TRUSTS. DEEDS OF TRUST.**

- (1) In general.** (See page 783.)
- (2) Presentation is necessary when.** (See page 783.)
- (3) Recovery of specific property.** (See page 784.)
- (4) Deeds of trust.** (See page 785.)

**16. APPEAL.**

- (1) In general.** (See page 786.)
- (2) Right of appeal. Jurisdiction.** (See page 787.)







**PART VIII.**  
**SALES AND CONVEYANCES OF PROPERTY OF**  
**DECEDENTS.**

**CHAPTER I.**  
**SALES IN GENERAL.**

**CHAPTER II.**  
**SALES OF PERSONAL PROPERTY.**

**CHAPTER III.**  
**SUMMARY SALES OF MINES AND MINING INTERESTS.**

**§ 515a. Order for sale, proceedings to procure.**

**§ 515a. Order for sale of. Proceedings to procure.** To obtain an order to enter into an agreement for the sale of a mining claim, or claims, or real property, worked as a mine, the proceedings to be taken and the effect thereof shall be as follows:

**[Petition.]** First—The executor, administrator, guardian of a minor, or of an incompetent person, or any person interested in the estate of such decedents, minors, or incompetent persons, may file a verified petition showing:

**[Requirements.]** 1. The advantage or advantages that may accrue to the estate from entering into such an agreement.



2. A general description of the property affected by said agreement.

3. The terms and general conditions of the proposed agreement.

4. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, so far as known to the petitioner.

**[Order to show cause.]** Second—Upon filing such petition an order shall be made by the court or judge requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than two or more than four weeks thereafter, then and there to show cause why an agreement for the sale of the realty should not be made, and referring to the petition on file for further particulars.

**[Service of order.]** Third—The order to show cause must be personally served on the persons interested in the estate at least ten days before the time appointed for hearing the petition, or it may be published for four successive weeks in a newspaper of general circulation in the county if there be one, and if there is none then in some newspaper of general circulation in the county.

**[Hearing—Order of sale—Requirements.]** Fourth—At the time and place appointed to show cause, or at such other time and place to which the hearing may be postponed the power to make all needful postponements being hereby vested in the court or jury, the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objections that may have been filed or presented thereto. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to enter into the proposed agreement for the sale of the mines or real estate, an order must be made authorizing, empowering and directing the executor, administrator or the guar-



dian to make such agreement. The order may prescribe the terms and conditions of such agreement.

**[Conditions of sale.]** Fifth—After the making of the order to enter into said agreement, the executor, administrator or guardian of a minor or of an incompetent person shall execute, acknowledge and deliver an agreement containing the conditions specified in the order, setting forth in the agreement that it is made by authority of the order, and giving the date of such order.

A certified copy of the order shall be recorded in the office of the county recorder of every county in which the land affected by the agreement or any portion thereof is situated.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1897), § 1580.**



## CHAPTER IV.

### SALES OF REAL ESTATE, INTERESTS THEREIN AND CONFIRMATION THEREOF.

§ 569a. Sale of real estate by executor, etc., commission to agent.

#### PROBATE SALES.

##### I. Nature of Jurisdiction. Law Governing.

1. Nature of proceedings.
  - (1) In general.
  - (2) Proceedings are statutory.
  - (3) Policy of law as to title.
2. Jurisdiction.
  - (1) When acquired.
  - (2) Nature and extent.
  - (3) Basis of jurisdiction.
  - (4) Not dependent on truth of petition.
3. Law governing probate sales.
  - (1) In general.
  - (2) Statute of frauds.
  - (3) Statute of limitations.
  - (4) Not dependent on truth of petition.

##### II. Sales of Real and Personal Property in General.

1. Property capable of sale in general.
  - (1) Rule at common law.
  - (2) Rule under codes and statutes.
  - (3) Rule where personalty is insufficient.
2. Particular interests in property.
  - (1) Sales of mines and mining interests.
  - (2) Sale of property subject to lease.
  - (3) Sale of partnership interests.
  - (4) Sale of community interests.
  - (5) Homestead under United States land laws.
  - (6) Sale of contracts for purchase of realty.
  - (7) Property under mortgage or other lien.
  - (8) Same. Application of purchase money.
  - (9) Choses in action.
3. When sale is not confirmed.
4. Petition for order.
  - (1) In general.
  - (2) Defects. Mistakes. Omissions.



- (3) May be made when. Laches in filing.
- (4) Parties to the proceeding.
- (5) Necessity for sale.
- (6) Condition of property.
- (7) Description of property.
- (8) Reference to other papers.
- (9) Verifying the petition.
- (10) Amending the petition.
- (11) Defects cured by the order of sale.
- (12) Defects not cured by the order.
- (13) Creditor's petition.
- 5. Opposing the application.
  - (1) In general.
  - (2) Demurrer to the petition.
- 6. Sale for payment of debts.
  - (1) In general.
  - (2) Contesting debts on the hearing.
  - (3) "Demand." When not a debt or claim.
  - (4) Expenses of administration.
- 7. Sale to pay funeral expenses.
- 8. Specific devises to contribute to payment of debts.
  - (1) In general.
- 9. Sale to pay legacies.
- 10. Sale for best interests of the estate or heirs.
- 11. Order to show cause. Notice of hearing.
  - (1) In general.
  - (2) Service of notice.
- 12. Hearing.
  - (1) Demand for jury trial of issues.
  - (2) Questions not considered.
  - (3) Findings.
- 13. Notice after appeal.
- 14. Order of sale.
  - (1) In general.
  - (2) Validity of.
- 15. Notice of sale.
  - (1) In general.
  - (2) Publication.
- 16. Ordering resale.
- 17. Nunc pro tunc order of sale.
- 18. Public sale.
- 19. Private sale.
- 20. Return of sales.
- 21. Irregularities in sale. Mutual mistake.
- 22. Fraudulent sales.
- 23. Executor purchasing at his own sale.
  - (1) Generally prohibited.



- (2) Invalidity of such purchase. Remedy.
  - (3) Such purchase is not void when.
- 24. Substitution of purchasers.
- 25. Illegal contracts with executor or administrator.
- 26. Irregularities covered by retroactive acts.
- 27. Sales by guardian.
- 28. Sales by foreign executor.
- 29. Exchange is not a sale.
- 30. Sales without order.
- 31. Title conveyed by sale.
- 32. Bona fide purchasers.
  - (1) Rights of.
  - (2) How affected by adverse possession.
- 33. Necessary sale is valid when.
- 34. Voidable sales.
- 35. Void sales.
- 36. Vacating sales.
- 37. Rights of heirs.
  - (1) In general.
  - (2) Heirs under guardianship.
  - (3) Action by heirs in general to set aside sales.
  - (4) Actions by minor heirs to set aside sales.
- 38. Sales under power in the will.
  - (1) In general.
  - (2) No implied power when.
  - (3) Discretion of executor.
  - (4) For best interests of estate.
  - (5) Devesting estate.
  - (6) Agent to sell. Compensation.
  - (7) Purchasers. Estoppel.
  - (8) Validity of sale.
  - (9) Equitable conversion. Election for reconversion.
  - (10) Devise in trust with power to sell.
  - (11) Directions coupled with the trust. Effect of.
  - (12) Power passes to administrator with will annexed.
  - (13) Particular sales under power in the will.
  - (14) Purchase by executor failing to qualify.
  - (15) Return of sales under power in will. Confirmation.
- 39. Sale of pretermitted child's interest.
- 40. Limitations of actions for vacating sale.
- 41. Appeal.

### III. Confirmation of Sales and Conveyances.

- 1. Discretion of court as to confirmation.
- 2. Authority to confirm, when presumed.
- 3. When required.



4. When not required.
5. No power to confirm when.
6. Objections to confirmation.
7. Effect of the order.
8. Refusing confirmation. Effect of the order.
9. Refusal to report sale for confirmation. Effect of.
10. Action to set aside confirmation.
11. Conveyance.
  - (1) In general.
  - (2) May be ordered when.
  - (3) Is individual deed when.
  - (4) Conditions not to be imposed.
  - (5) Title carried by.
  - (6) Is void when.
  - (7) Mandate to compel.
12. Appeal.

#### IV. Direct and Collateral Attack Upon Sales.

1. Direct attack in general.
2. Distinction between direct and collateral attack.
3. Collateral attack.
  - (1) In general.
  - (2) What can not be questioned.
  - (3) Presumptions on.
  - (4) What is good on collateral attack.

#### V. Appeal

1. In general.
2. Non-appealable orders.
3. Appealable orders.
4. Parties interested or aggrieved.
5. Parties not interested or aggrieved.
6. Affirming the order of sale on appeal.
7. Record on appeal.
8. Decree. Effect of, on appeal.
9. Res judicata. Law of the case.

**§ 569a. Sale of real estate by executor, etc. Commission to agent.** In any order of sale of real estate or subsequent to making any such order the court may authorize any executor or administrator to enter into a contract with any bona fide real estate agent to secure a purchaser providing for the payment by the estate to said agent of a commission, the amount of which shall be specified, payable

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out of the proceeds of any such sale. If a sale to a purchaser obtained by such agent is returned to the court for confirmation and said sale be confirmed to such purchaser, such contract shall be binding and valid as against the estate.

**[No personal liability of executor, etc.]** By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed and unless such contract be by the court first authorized.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1891), § 1559.**

#### **I. NATURE OF JURISDICTION. LAW GOVERNING.**

##### **1. NATURE OF PROCEEDINGS. (See page 886.)**

- (1) In general. (See page 886.)**
- (2) Proceedings are statutory. (See page 887.)**

##### **2. JURISDICTION. (See page 888.)**

- (1) When acquired. (See page 888.)**
- (2) Nature and extent. (See page 888.)**
- (3) Basis of jurisdiction. (See page 888.)**
- (4) Not dependent on truth of petition. (See page 889.)**

##### **3. LAW GOVERNING PROBATE SALES.**

**(1) In general.** A sale by executors or trustees under a will is on the same footing as a judicial sale, and where there is jurisdiction or authority to make the sale, the purchaser takes the complete title of the decedent relieved of all burdens and liabilities of the administration under which the sale is made and that the purchase price or proceeds of such sale takes the place of the property so disposed of and which proceeds become liable for the burdens of administration, for the payment of debts, legacies, etc., and that the heir takes a distributive share of the proceeds and has no title



to the land after the decease of the ancestor: *Spencer v. Lyman*, 27 S. Dak. 480. (See page 889.)

(2) **Statute of frauds.** (See page 890.)

(3) **Statute of limitations.** (See page 890.)

## II. SALES OF REAL AND PERSONAL PROPERTY IN GENERAL.

### 1. PROPERTY CAPABLE OF SALE IN GENERAL.

(See page 890.)

(1) **Rule at common law.** (See page 890.)

(2) **Rule under code and statutes.** (See page 890.)

(3) **Rule when personalty is insufficient.** (See page 892.)

### 2. PARTICULAR INTERESTS IN PROPERTY.

(1) **Sales of mines and mining interests.** (See page 893.)

(2) **Sale of property subject to lease.** (See page 893.)

(3) **Sale of partnership interests.** (See page 894.)

(4) **Sale of community interests.** (See page 894.)

(5) **Homestead under United States land laws.** (See page 894.)

(6) **Sale of contracts for purchase of realty.** (See page 895.)

(7) **Property under mortgage or other lien.** (See page 896.)

(8) **Same. Application of purchase money.** (See page 896.)

(9) **Choses in action.** A sheriff's certificate of sale is personal property and an executor as such has a right to assign it and a sale regularly so made transfers all the interest therein of the devisees under the will of which he is



executor: *Winterberg v. Van De Vorste*, 19 N. Dak. 423; see also *Boschker v. Van Beck*, Id. 104.

### 3. WHEN SALE IS NOT AUTHORIZED.

#### 4. PETITION FOR ORDER.

(1) **In general.** (See page 898.)

(2) **Defects, mistakes, omissions.** If the petition upon which the order for sale is made is so defective that the court did not acquire jurisdiction, the order may be assailed at any time upon a collateral as well as upon a direct attack; but if the facts stated in the petition are sufficient to confer jurisdiction upon the court to hear the application, its order directing a sale can not be impeached upon a collateral attack: *Plains Land & Imp. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 853. (See page 899.)

(3) **May be made when. Laches in filing.** (See page 900.)

(4) **Parties to the proceeding.** (See page 901.)

(5) **Necessity for sale.** It is not an abuse of discretion to deny an application for a sale of specifically devised real property for the purpose of paying the only claim against the estate of the deceased, notwithstanding that there is no other property immediately available for such purpose, where it appears that the result of certain pending litigation for the recovery of property claimed to belong to the estate may be such as to render a sale of such devised land unnecessary: *Estate of Braff*, 166 Cal. 103, 134 Pac. 1140.

Where an estate of a deceased person is in process of settlement and there is no claim filed against the estate, nor any debts left by the deceased, there is no occasion for the heirs, to whom the real estate descended, to apply to the probate court for authority to sell it. Such authority is required only where the personal estate is insufficient to meet the indebtedness of the decedent: *Sturgeon v. Culver*, 87 Kan. 404, 124 Pac. 419.



- (6) **Condition of property.** (See page 903.)
- (7) **Description of property.** (See page 903.)
- (8) **Reference to other papers.** (See page 903.)
- (9) **Verifying the petition.** (See page 904.)
- (10) **Amending the petition.** (See page 905.)

(11) **Defects cured by the order of sale.** Under section 1537 of the Code of Civil Procedure, although the petition for the sale of the real estate is required to state "the condition and value thereof," yet the failure to make such statement will not invalidate the subsequent proceedings, if the defects be supplied at the hearing, and the general facts showing the necessity for the sale, or that it is for the advantage, benefit, and best interest of the estate and those interested therein, be stated in the decree: *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067.

A sale of real estate made in the Indian Territory, belonging to the estate of a deceased person, made by a duly appointed administratrix, upon a petition therefor filed, but without notice of the application being given as provided by the statute, and the petition being deficient in form, though in substantial compliance with the statute, and where the sale has been confirmed, is not void, and will not be set aside in a direct proceeding instituted for that purpose, unless it be shown that actual fraud was committed or that there existed some other ground of acknowledged equity jurisdiction: *Steele v. Kelley*, 32 Okla. 547, 122 Pac. 934. (See page 905.)

- (12) **Defects not cured by the order.** (See page 905.)
- (13) **Creditor's petition.** (See page 906.)

## 5. OPPOSING THE APPLICATION.

- (1) **In general.** (See page 907.)
- (2) **Demurrer to the petition.** (See page 907.)



## 6. SALE FOR PAYMENT OF DEBTS.

(1) **In general.** An offer to furnish a bond conditioned to pay the debts mentioned in the application does not deprive the court of authority to order a sale: *Butts v. McCleod*, — Kan. —, 132 Pac. 1175. (See page 908.)

(2) **Contesting notes on the hearing.** (See page 909.)

(3) **“Demand.” When not a debt or claim.** (See page 910.)

(4) **Expenses of administration.** (See page 910.)

## 7. SALE TO PAY FUNERAL EXPENSES.

(See page 911.)

## 8. SPECIFIC DEVICES TO CONTRIBUTE TO PAYMENT OF DEBTS.

Where there is no personal property in an estate and all the real property is specifically devised the rule that such land can not be sold for the payment of debts and expenses of administration has no application: *Howe v. Kern*, 63 Or. 487, 128 Pac. 820.

(1) **In general.** An administrator is not entitled to distribute money received on a compromise of a claim by the estate against another and then have the real estate sold for the payment of debts and expenses: *Randolph v. Prowers*, — Colo. —, 122 Pac. 808.

There being no statute of limitations provided with regard to a proceeding instituted in the probate court for the sale of real estate to pay debts of the testator, the requirement of the law is that such a proceeding can be maintained only if begun within a reasonable time, in view of all the circumstances of the case: *In re Jones's Estate* (*Thomas v. Williams*), 80 Kan. 632, 103 Pac. 772. (See page 911.)



**9. SALE TO PAY LEGACIES. (See page 911.)****10. SALE FOR BEST INTERESTS OF THE ESTATE OR HEIRS.**

The amendment of 1893 to sections 1536 and 1545 of the California Code of Civil Procedure, authorizing a sale of the real property forming part of the estate of a decedent, when it is for the best interests of the heirs that a sale should be had, was prospective only in its effect, and did not authorize a sale for this cause of real estate, or interests therein, held by the decedent at his death, where such death occurred prior to the enactment of the amendment: *Estate of Bazzuro*, 161 Cal. 71, 118 Pac. 434.

The basis and reason of this rule is that the title had vested in the heirs before the law was enacted, and that, because of constitutional limitations to legislative power over vested rights, such title could not be impaired or burdened by subsequent legislation imposing burdens not before existing: *Estate of Bazzuro*, 161 Cal. 72, 118 Pac. 434.

This rule is inapplicable as to real property, the title to which was acquired by the administrator of the estate, subsequent to the death of the deceased, under a foreclosure of a mortgage belonging to the deceased at the time of his death. The title to the interest of the heirs in the mortgage indebtedness, which was the consideration for the deed to the administrator, vested in them as personal property, at the death of the decedent, and was then subject to sale as such, under section 1523 of the Code of Civil Procedure, if such sale was for the best interest of the estate, whether necessary to pay debts or not: *Estate of Bazzuro*, 161 Cal. 72, 118 Pac. 434. (See page 912.)

**11. ORDER TO SHOW CAUSE. NOTICE OF HEARING.****(1) In general. (See page 913.)**

**(2)** The statutory provisions of the state of Oregon inhibit the sale of real property of an estate except upon an order made after a hearing to which the heirs and devisees have been duly cited to appear in the manner and form re-



quired by Secs. 1174, 1175, B. & C. Comp., and when, as the result of such hearing, it has been judicially determined and a finding made that the proceeds of the sale of the personal property have been exhausted and there are claims against the estate unsatisfied, rendering the sale necessary: *Smith v. Whiting*, 55 Or. 393, 106 Pac. 793.

**12. HEARING.** (See page 914.)

**(1) Demand for jury trial of issues.** (See page 914.)

**(2) Questions not considered.** (See page 915.)

**(3) Findings.** (See page 915.)

**13. NOTICE AFTER APPEAL.** (See page 915.)

**14. ORDER OF SALE.**

**(1) In general.** The executors of the estate of a deceased person have no authority to sell and transfer notes belonging to the deceased. They are assets of the estate which can be sold only under and by an order of the probate court having jurisdiction of said estate: *Jones v. Wheeler*, 23 Okla. 771, 101 Pac. 1112. (See page 915.)

**(2) Validity of.** (See page 916.)

**15. NOTICE OF SALE.**

**(1) In general.** Statutes of 1851, page 470, section 177 of the Probate Act in effect in 1872, provided that notice should be given by an executor of the sale of real estate, unless there was special direction given in the will, in which case the executor should be governed by such direction. It was held that a sale, though given without notice, was not invalid where the will made no specific direction as to whether the sale should be with or without notice, but provided that the executors, within a reasonable time, should sell the property: *Bagley v. City and County of San Francisco*, 19 Cal. App. 255, 125 Pac. 931. (See page 917.)

**(2) Publication.** Proof of due publication of notice to interested persons to show cause as required by statute con-



fers jurisdiction, and court's subsequent action on defective petition is within its jurisdiction and reversible only for error of law on direct appeal: *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067.

Under Code Civ. Proc., Sec. 1537, sale is not invalid for failure of petition to state "condition and value" of the property or any other matters enumerated to be stated, provided facts showing necessity of sale are proved and found: *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067. (See page 917.)

#### 16. ORDERING RESALE.

The provisions of Sec. 5520, Rev. Codes of Idaho, given to the court as to accepting a 10 per cent raise in a bid or ordering a new sale, confer a legal discretion on the court, and the provisions of the section clearly contemplate that the offer there referred to must be made in the probate court, at the time of the hearing of the confirmation and not a long time after such hearing and after an appeal has been taken to the district court: *McGregor v. Jensen*, 18 Ida. 320, 109 Pac. 731. (See page 919.)

#### 17. NUNC PRO TUNC ORDER OF SALE. (See page 919.)

#### 18. PUBLIC SALE. (See page 919.)

#### 19. PRIVATE SALE.

A private sale of real estate under a power given by the will to the executors made without notice, which was reported to and confirmed by the probate court, is not subject to collateral attack, as against the purchaser, by an heir, made thirty-three years after the confirmation and nearly twenty years after such heir had ceased to be a minor. A plea of want of actual knowledge of the sale until three years before the commencement of the action can not justify the long delay of the heir in bringing the action. The statute of limitations embodied in Secs. 343 and 1573, Code Civ. Proc., had long run in favor of the purchaser at



such sale before such attack: *Bayley v. Bloom*, 19 Cal. App. 255, 125 Pac. 931. (See page 920.)

20. RETURN OF SALES. (See page 920.)

21. IRREGULARITIES IN SALE. MUTUAL MISTAKE.

Irregularities as to amount of land sold and manner of sale held only error of judgment immaterial on collateral attack and remediable only by review as provided by law: *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067. (See page 921.)

22. FRAUDULENT SALES.

Where a sale is brought about by fraud, a judgment or other proceeding may be collaterally attacked in a court of equity, but the bill must charge the purchaser with notice of fraud and there should be an offer to restore the purchase money: *Shane v. People*, 25 N. Dak. 191. (See page 921.)

23. EXECUTOR PURCHASING AT HIS OWN SALE.

(1) **Generally prohibited.** It is true that the act of purchasing property of the estate by the executor or administrator thereof is expressly enjoined by section 1576 of the Code of Civil Procedure, but it has uniformly been held in this state that the purchase of such property by such officer involves an act which is not void, but only voidable: *French v. Phelps*, 20 Cal. App. 101, 128 Pac. 772, 776. (See page 922.)

(2) **Invalidity of such purchase. Remedy.** (See page 923.)

(3) **Such purchase is not void when.** (See page 924.)

REFERENCES.

As to validity and enforceability of purchase by executor or administrator of interest of devisee, legatee, or heir, in estate, see note, *Ann. Cas.* 1913A, 1115.



**24. SUBSTITUTION OF PURCHASERS. (See page 924.)****25. ILLEGAL CONTRACTS WITH EXECUTOR OR ADMINISTRATOR.**

Where one brother and joint heir agreed with another brother who was the administrator selling the land, to bid in the land at the administrator's sale and the agreement was carried out, it was held that the same constituted the bidder a constructive trustee of the land and that it was not such a trust as was required by Sec. 7267, Snyder's Comp. Laws of Oklahoma, to be in writing: *Turner v. Turner*, 31 Okla. 272, 125 Pac. 730. (See page 924.)

**26. IRREGULARITIES COVERED BY RETROACTIVE ACTS.**

Where a probate court has jurisdiction of an estate and the administrator files a petition for sale of real estate to pay debts and the sale is had after due notice and the sale is confirmed by the court and an administrator's deed duly executed and delivered to the purchaser, the fact that the petition for sale did not set out fully all the circumstances called for by the statute was an irregularity which did not affect the validity of the sale, under the express provisions of the Act of March 28, 1890, state of Washington: *Jones v. Seattle Brick & Tile Co.*, 56 Wash. 166, 105 Pac. 240, 241. (See page 924.)

**27. SALES BY GUARDIAN. (See page 925.)****28. SALES BY FOREIGN EXECUTOR.**

Where a resident of Iowa died in that state and administration of her estate was had, and on such administration a creditor proved his claim and said claim was allowed by the court, but there were not assets in such jurisdiction sufficient to pay the same, and an ancillary administration was had in North Dakota where there was real estate belonging to the estate, but no money or personal property, and there were no debts, and a petition was filed in said ancillary ad-



ministration by the administrator in the principal administration under the direction of said principal court, asking for the sale of the real estate in North Dakota and the transmission of the proceeds to said principal court for the payment of the debts there proved and allowed, held that such petition should have been granted even though such debts had not been proved in North Dakota in the said ancillary administration: *Dow v. Lillie* (N. Dak.), 144 N. W. 1087.

A foreign executor with testamentary power to sell and convey land in the state of Kansas may make a valid contract to convey before the will has been admitted to record in that state in accordance with the statute. All that the Kansas statute requires in that behalf is that the will shall be of record at the time of conveyance: *Niguette v. Green*, 81 Kan. 569, 106 Pac. 270.

A delay of six years by a foreign executor to petition for the sale of land in the state of Kansas to pay the indebtedness of the testator is not unreasonable, when it is occasioned by the pendency of litigation carried on in good faith to determine the validity and amount of such indebtedness: *In re Jones's Estate* (*Thomas v. Williams*), 80 Kan. 632, 103 Pac. 772. (See page 926.)

29. EXCHANGE IS NOT A SALE. (See page 926.)

30. SALES WITHOUT ORDER. (See page 926.)

31. TITLE CONVEYED BY SALE. (See page 927.)

### 32. BONA FIDE PURCHASERS.

(1) **Rights of.** Where decedent's widow and children conveyed land part of the estate and which land was afterward sold by the administratrix under order of the court to pay decedent's debts, the purchaser from the administratrix took title as against the grantee from the widow and children: *Rio Grande Ry. Co. v. Salt Lake Inv. Co.*, 35 Utah 528, 101 Pac. 589.



Where the plaintiff waits for nearly twenty years after reaching her majority and then institutes proceedings to set aside a sale made to an innocent purchaser for value by the executors of her father's estate in the utmost good faith and by virtue of a purported power in the will, and afterward confirmed by a solemn decree of the court, no judicial tribunal, with proper regard for vested interests and that wise public policy which fosters the stability of titles, should allow her want of actual knowledge of the adverse claims to operate, under such circumstances, to protect her from the bar of the statute of limitations: *Bagley v. City and County of San Francisco*, 19 Cal. App. 255, 125 Pac. 931, 933. (See page 928.)

(2) **How affected by adverse possession.** (See page 928.)

### 33. NECESSARY SALE IS VALID WHEN.

(See page 929.)

#### REFERENCES.

As to sales void for that in excess of the order of sale, see note, 17 Am. Dec. 65.

As to sales and, in that connection, laches in applying for orders to pay debts, see note, 26 Am. St. 22.

As to the right of heirs or legatees to enjoin the sale of realty by the executor under power in the will, see note, Ann. Cas. 1912B, 1019.

### 34. VOIDABLE SALES.

Sale of land to appraiser held voidable only: *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067. (See page 929.)

### 35. VOID SALES.

Where a large part of the purchase money received from a void sale by an administrator was used to pay the debts of the estate which were a charge upon the land heirs are not entitled to recover the land forced from those charges: *Browne v. Coleman*, 62 Or. 454, 125 Pac. 280.



Heirs of a decedent who with knowledge that the sale of lands by an administrator was invalid accepted their distributive share of the proceeds of the sale are estopped from questioning its validity: *Browne v. Coleman*, 62 Or. 454, 125 Pac. 280.

One who buys land in the state of Kansas from the devisees, seven years after the death of the testator, while a resident of another state, is not protected as an innocent purchaser against proceedings thereafter brought to subject it to the payment of debts of the estate: *In re Jones's Estate (Thomas v. Williams)*, 80 Kan. 632, 103 Pac. 772. (See page 930.)

### 36. VACATING SALES.

In North Dakota the defense of the statute of limitations can not be raised by demurrer even though the fact is apparent on the face of the complaint. The law is well established that there is a strong presumption in favor of the validity of sales by the court sitting in probate. To subject a judgment to collateral attack the absence of jurisdiction must appear on the face of the judgment. The proceedings leading up to the sale of real estate by an administrator are proceedings in rem. The rule of law is well settled upon principles of public policy, that evidence aliunde the record can not be availed of in a collateral attack upon a judgment of a domestic court of general jurisdiction, regular on its face: *Shane v. Peoples*, 25 N. Dak. 191. (See page 931.)

### 37. RIGHTS OF HEIRS.

(1) **In general.** (See page 931.)

(2) **Heirs under guardianship.** (See page 933.)

(3) **Action of heirs in general to set aside sales.** Where the heirs join with the administrator in asking for a sale of real estate in a particular way and after it was made joined in a writing asking that the sale be confirmed and afterward received the purchase money on the distribution of the estate, they are estopped from setting the sale aside on the



ground of irregularities: *Cunningham v. Richardson*, 68 Wash. 24, 122 Pac. 369. (See page 933.)

(4) **Actions by minor heirs to set aside sales.** (See page 934.)

### 38. SALES UNDER POWER IN THE WILL.

(1) **In general.** (See page 934.)

(2) **No implied power when.** (See page 935.)

(3) **Discretion of executor.** An executrix who, in selling real estate under a will which provided that the property "may be sold when a fair price may be obtained therefor satisfactory to all," used the same judgment in selling such property as she did toward her own, and received the approbation of her two brothers, who were co-owners with her of such property, will be deemed to have used all necessary care, and entitled to commissions on the sale: *Estate of Robl*, 163 Cal. 801, 127 Pac. 55. (See page 936.)

(4) **For best interests of estate.** (See page 936.)

(5) **Devesting estate.** (See page 936.)

(6) **Agent to sell. Compensation.** (See page 937.)

(7) **Purchasers. Estoppel.** (See page 937.)

(8) **Validity of sale.** (See page 937.)

(9) **Equitable conversion. Election for reconversion.** In the case of *Wood v. Pohrsson*, 21 N. Dak. 370, it is held that where the will directed the executrix to sell on or before a certain date all the testator's real estate and that the proceeds were to be distributed among the children, such provision operated as an equitable conversion of such real property with personalty, from the date of the testator's death, for the purpose of its administration. (See page 938.)

### REFERENCES.

Effect of provisions in will for equitable conversion upon wife's dower or distributive share, where the will makes no provision for



her, or she renounces such provision, see note 22 L. R. A. (N. S.) 285.

As to when there is such a failure of testator's purpose or object as to preclude the application of the doctrine of equitable conversion, see note 20 L. R. A. (N. S.) 117.

As to when conversion takes place under a direction to sell real property, which postpones the sale to an ascertainable time, see note 20 L. R. A. (N. S.) 65.

**(10) Devise in trust with power to sell.** Where a will of a testatrix after providing for the payment of certain special pecuniary legacies, directed that all her real estate, with a specified exception, should be sold by her executors to the best advantage, and after the payment of such legacies which were expressly charged upon the real estate so to be sold bequeathed "all the rest and residue of the proceeds of said real estate so to be sold" to certain persons named as trustees in trust, to found and maintain a home for aged and infirm men, and by a residuary clause bequeathed the remainder of her estate to her husband, the only proceeds of her real property passing to such trustees were proceeds of such real property as she owned at her death and which her executors were empowered to sell. The proceeds of a portion of her real estate, sold in her lifetime, under a contract for its sale which had become executed before her death, and which proceeds were collected by her executors after her death, did not pass to such trustees but passed under the residuary clause. There is nothing in the provisions of sections 1301 or 1303 of the Civil Code militating against such a construction: *Estate of Dwyer*, 159 Cal. 664, 115 Pac. 235. (See page 939.)

#### REFERENCES.

Conversion by directing sale after devising land, see note 39 L. R. A. (N. S.) 817.

**(11) Directions coupled with the trust. Effect of.** (See page 940.)

**(12) Power passes to administrator with will annexed.** An executor or administrator with the will annexed, where power of sale of real estate has been given by the will, has,



as a general rule, considerable discretion as to the manner and conduct of such sale, and may sell at private sale at his discretion, when prudently and honestly exercised: *Bull v. Bal*, 17 N. Mex. 466, 130 Pac. 252. (See page 940.)

#### REFERENCES.

As to whether a special power, other than a power of sale, conferred on executor by will passes to an administrator with the will annexed, see note 29 L. R. A. (N. S.) 264.

(13) **Particular sales under power in the will.** (See page 941.)

(14) **Purchase by executor failing to qualify.** (See page 941.)

(15) **Return of sales under power of will. Confirmation.** (See page 941.)

39. **SALE OF PRETERMITTED CHILD'S INTEREST.**  
(See page 942.)

40. **LIMITATIONS OF ACTIONS FOR VACATING SALE.** (See page 943.)

#### 41. APPEAL.

An order directing the sale of land by an administrator is appealable, and after such order becomes final, matters that were properly justifiable upon the hearing therefor can not be again reopened and litigated upon the hearing of the return of sale: *Estate of Bazzuro*, 161 Cal. 72, 118 Pac. 434.

### III. CONFIRMATION OF SALES AND CONVEYANCES.

#### 1. DISCRETION OF COURT AS TO CONFIRMATION.

It was an abuse of discretion for the court to confirm a sale of real property belonging to the estate of a deceased person, for a price less than one-sixth of its real value, because of supposed defects in its title, where it appears probable that such defects could have been removed by a suit  
Probate Sup. 18.



brought for that purpose. The court should have directed suit to that end, and, in the meantime, refused confirmation: *Estate of Bazzuro*, 161 Cal. 72, 118 Pac. 434.

From the express provisions of section 7548, Rev. Codes of Montana, there is implied authority for the district court or judge to exercise a judicial discretion in determining whether a particular sale of personal property belonging to an estate shall, or shall not, be confirmed and where on application for confirmation a higher bid is made it is not an abuse of that discretion for the court to refuse to confirm the sale and to order a resale: *State v. District Court etc.*, 42 Mont. 182, 111 Pac. 719. (See page 943.)

2. AUTHORITY TO CONFIRM, WHEN PRESUMED.

(See page 943.)

3. WHEN REQUIRED. (See page 944.)

4. WHEN NOT REQUIRED. (See page 944.)

5. NO POWER TO CONFIRM WHEN. (See page 944.)

6. OBJECTIONS TO CONFIRMATION.

The successor of the sole heir of the deceased is a party interested in such sale, and entitled to resist the confirmation thereof and appeal from the order of confirmation, and the fact that she was in good faith asserting an adverse title to the land, which was the cause of the low bid, does not estop her from objecting to the confirmation: *Estate of Bazzuro*, 161 Cal. 73, 118 Pac. 434. (See page 945.)

7. EFFECT OF ORDER. (See page 945.)

8. REFUSING CONFIRMATION. EFFECT OF THE ORDER. (See page 945.)

9. REFUSAL TO REPORT SALE FOR CONFIRMATION. EFFECT OF. (See page 945.)



**10. ACTION TO SET ASIDE CONFIRMATION.**

(See page 946.)

**11. CONVEYANCE.**

- (1) **In general.** (See page 946.)
- (2) **May be ordered when.** (See page 946.)
- (3) **Individual deed when.** (See page 947.)
- (4) **Conditions not to be imposed.** (See page 947.)
- (5) **Title carried by.** (See page 947.)
- (6) **Is void when.** (See page 947.)
- (7) **Mandate to compel.** (See page 948.)

**12. APPEAL.**

It is the duty of the superior court upon an appeal from an order confirming a sale of real property in the matter of the estate of a deceased person, where the appeal is taken under the new method, to certify to the papers requested in the notice to the clerk given under section 953a of the Code of Civil Procedure. Such papers, and the reporter's transcript of the testimony and proceedings taken and had at the hearing, constitute the transcript contemplated by section 953a on such an appeal. There is no "judgment-roll," strictly speaking, in proceedings in probate, but, whenever proceedings in probate are so akin to a civil action as to necessitate the "papers" which are declared by section 670 to constitute the judgment-roll in a civil action, they may be held to constitute the judgment-roll referred to in section 661. They are a quasi judgment-roll only, but they will be held equivalent thereto whenever the interests of justice require it in considering the sufficiency of a transcript on appeal: *Going v. Guy*, 166 Cal. 279, 135 Pac. 1128.



**IV. DIRECT AND COLLATERAL ATTACK UPON SALES.****1. DIRECT ATTACK IN GENERAL. (See page 948.)**

Suit to quiet title is collateral attack on administrator's sale: *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067.

**2. DISTINCTION BETWEEN DIRECT AND COLLATERAL ATTACK. (See page 948.)****3. COLLATERAL ATTACK. (See page 949.)**

(1) **In general. (See page 949.)**

(2) **What can not be questioned. (See page 950.)**

(3) **Presumptions on. (See page 950.)**

(4) **What is good on collateral attack. (See page 950.)**

**V. APPEAL.****1. IN GENERAL. (See page 951.)****2. NONAPPEALABLE ORDERS. (See page 951.)****3. APPEALABLE ORDERS. (See page 951.)****4. PARTIES INTERESTED OR AGGRIEVED.  
(See page 952.)****5. PARTIES NOT INTERESTED OR AGGRIEVED.  
(See page 952.)****6. AFFIRMING THE ORDER OF SALE ON APPEAL.  
(See page 953.)****7. RECORD ON APPEAL. (See page 953.)****8. DECREE. EFFECT OF ON APPEAL. (See page 953.)****9. RES JUDICATA LAW OF THE CASE. (See page 954.)**



## CHAPTER V.

**EXECUTORY CONTRACTS OF DECEASED. SPECIFIC PERFORMANCE.**

- 1. Contracts of decedent to convey real estate.**
  - (1) Scope and validity of statute.
  - (2) Jurisdiction. Probate courts and equity.
  - (3) Petition.
  - (4) Specific performance may be enforced when.
  - (5) Specific performance can not be enforced when.
  - (6) Nunc pro tunc orders. Costs.
  - (7) Appeal. Law of the case.
- 2. Enforcement of other contracts made by decedent.**
  - (1) Obligation to perform contracts of deceased.
  - (2) What contracts may be enforced.
  - (3) What contracts can not be enforced.
- 3. Contracts to make a will.**
  - (1) When enforceable.
  - (2) When not enforceable.
  - (3) Parties. Misjoinder.

**1. CONTRACTS OF DECEDENT TO CONVEY REAL ESTATE.**

- (1) Scope and validity of statute.** (See page 968.)
- (2) Jurisdiction. Probate courts and equity.** (See page 969.)

**(3) Petition.** It is not necessary that a petition under Sec. 7614, Rev. Codes of Montana, by the purchaser for specific performance of a contract to sell real estate by the decedent, should contain negative allegations of the non-existence of the instances in which specific performance of a contract will not be enforced as contained in Sec. 6103, Rev. Codes of Montana: In re Grogan's Estate, 38 Mont. 540, 100 Pac. 1045.

A petition which sets forth the contract of which it is sought to have specific performance by the administrator of the deceased vendor is sufficient if it sets out the contract



and alleges the consideration to be a specific sum, under Sec. 7614, Rev. Codes of Montana: *In re Grogan's Estate*, 38 Mont. 540, 100 Pac. 1046. (See page 970.)

(4) **Specific performance may be enforced when.** (See page 971.)

(5) **Specific performance can not be enforced when.** (See page 971.)

(6) **Nunc pro tunc orders. Costs.** (See page 972.)

(7) **Appeal. Law of the case.** (See page 972.)

## 2. ENFORCEMENT OF OTHER CONTRACTS MADE BY DECEDENT.

(1) **Obligation to perform contracts of deceased.** (See page 973.)

(2) **What contracts may be enforced.** (See page 973.)

(3) **What contracts can not be enforced.** (See page 974.)

## 3. CONTRACTS TO MAKE A WILL. (See page 974.)

(1) **When enforceable.** (See page 974.)

(2) **When not enforceable.** (See page 975.)

(3) **Parties. Misjoinder.** (See page 976.)

## REFERENCES.

Devolution of vendee's interest under contract for the purchase of real property, see note 42 L. R. A. (N. S.) 446.



# **PART IX.**

## **MORTGAGES AND LEASES OF REAL ESTATE.**

### **CHAPTER I.**

#### **MORTGAGES AND LEASES.**

- § 611. Mortgage of real property of decedent, minor, etc. Lease.**  
**§ 617. Proceedings to obtain lease of realty.**

#### **MORTGAGES AND LEASES.**

##### **1. Mortgages.**

- (1) Construction and validity of statute.
- (2) Authority to mortgage. Jurisdictional facts.
- (3) Purpose to be shown.
- (4) Sufficiency of petition.
- (5) Validity of mortgage.
- (6) Presumptions. Creditor's right.
- (7) Procedure. Practice. Collateral attack. Appeal.
- (8) Foreclosure. Title of purchaser.

##### **2. Leases.**

- (1) Power of executor or administrator to lease.
- (2) Validity of lease.
- (3) Power of court to revoke or modify order authorizing release.
- (4) Power of representative to alter or modify existing lease.

**§ 611. Mortgage of real property of decedent, minor, etc. Lease.** Whenever, in any estate now being administered, or that may hereafter be administered, or in any guardianship proceeding now pending, or that may hereafter be pending, it shall appear to the superior court, or a judge thereof, to be for the advantage of the estate to raise money upon a note or notes to be secured by a mortgage of the real property of any decedent, or of a minor, or an incompetent person, or any part thereof, or to make a lease of said real



property, or any part thereof, or to agree to sell or give an option to purchase a mining claim, or mining claims, or real property worked as a mine, the court or judge, as often as occasion therefor shall arise in the administration of any estate, or in the course of any guardianship matter, may on a petition, notice, and hearing as provided in this article and Sec. 1580 of this code, authorize, empower and direct the executor or administrator, or guardian of such minor or incompetent person, to mortgage such real property, or any part thereof, and to execute a note or notes to be secured by such mortgage, or to lease such real estate, or any part thereof, or to enter into an agreement to sell such real estate, or any part thereof, or to give an option to purchase such real estate or any part thereof.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1893), § 1577.**

**§ 617. Proceedings to obtain lease of realty.** To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

**[Petition.]** First—The executor, administrator, guardian of a minor or an incompetent person, or any person interested in the estates of such decedents, minors or incompetent persons, must file a verified petition showing:

**[Requirements.]** a. The advantage or advantages that may accrue to the estate from giving a lease.

b. A general description of the property proposed to be leased.

c. The term, rental, and general conditions of the proposed lease.

d. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, so far as known to the petitioner.

**[Order of court to show cause.]** Second—Upon filing such petition an order shall be made by the court or judge requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less



than two nor more than four weeks thereafter, then and there to show cause why the realty (briefly indicating it) should not be leased for the period (stating it), at the rental mentioned in the petition (stating it), and referring to the petition on file for further particulars.

**[Service of order.]** Third—The order to show cause may be personally served on the persons interested in the estate at least ten days before the time appointed for hearing the petition, or it may be published for two successive weeks in a newspaper of general circulation in the county.

**[Hearing — Witnesses — Appraisers — Minimum rental.]** Fourth—At the time and place appointed to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objection that may have been filed or presented thereto. Upon such hearing witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court may, in its discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for the services, not exceeding five dollars per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering and directing the executor, administrator, or the guardian, to make such lease. The order may prescribe the minimum rental or royalty to be received for the premises, and the period of the lease, which must in no case be longer than for ten years, and may prescribe the other terms and conditions of such lease; provided that, for the purpose of exploiting for minerals, or mineral oils or petroleum and extracting minerals therefrom, the period of the lease may be for twenty years.



**[Conditions of lease.]** Fifth—After the making of the order to lease, the executor, administrator, or guardian of a minor or of an incompetent person, shall execute, acknowledge, and deliver a lease of the premises for the term and period and with the conditions specified in the order, setting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the leased land or any portion thereof lies.

**[Effect of lease—Errors and omissions.]** Sixth—Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions therein prescribed, the premises described therein. Jurisdiction of the court to administer the estate of the decedent, the minor, or of the incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the same, or the lease made in pursuance thereof.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1896), § 1579.**

## 1. MORTGAGES.

- (1) **Construction and validity of statute.** (See page 995.)
- (2) **Authority to mortgage. Jurisdictional facts.** (See page 996.)
- (3) **Purpose to be shown.** (See page 997.)
- (4) **Sufficiency of petition.** (See page 997.)
- (5) **Validity of mortgage.** (See page 997.)
- (6) **Presumptions. Creditor's right.** (See page 999.)
- (7) **Procedure. Practice. Collateral attack. Appeal.** (See page 1000.)
- (8) **Foreclosure. Title of purchaser.** (See page 1000.)



**2. LEASES.**

**(1) Power of executor or administrator to lease.** (See page 1001.)

**(2) Validity of lease.** (See page 1001.)

**(3) Power of court to revoke or modify order authorizing lease.** (See page 1002.)

**(4) Power of representative to alter or modify existing lease.** (See page 1002.)







## **PART X.**

### **POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND MANAGEMENT OF ESTATES.**

#### **CHAPTER I.**

##### **POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS. ACTIONS. MANAGEMENT OF ESTATES. PARTNERSHIP ESTATES.**

###### **I. Powers and Duties of Executors and Administrators.**

- 1. Title to property.**
- 2. Become trustees when.**
- 3. Executors de son tort.**
- 4. Duties of executors and administrators.**
- 5. Power of executors and administrators.**
  - (1) In general.**
  - (2) To dispose of personal property.**
  - (3) To compound, or compromise, in general.**
  - (4) Same. Restrictions. Approval of court.**
  - (5) Same. Distinction.**
  - (6) To bind estate.**
  - (7) Not to purchase claims against estate.**
  - (8) Not to purchase estate.**
  - (9) Can not do what.**
  - (10) With respect to leases and mortgages.**
  - (11) Can not litigate what claims.**
  - (12) In judicial proceedings.**
- 6. Joint administrators and co-executors.**
  - (1) In general.**
  - (2) Obligations and liability. Bond.**
  - (3) Same. Foundation of liability.**
- 7. Foreign and ancillary administration.**
  - (1) Foreign administration.**
  - (2) Same. Ancillary administration.**



**II. Actions by Executors or Administrators.**

1. In general.
2. Abatement. Discontinuance.
3. Parties.
4. By ancillary administrators.
5. By foreign executors or administrators.
6. Executor or administrator as representative.
7. By a co-executor.
8. Substitution. Revival of action.
9. Pleading.
10. Evidence.
11. Judgment.
12. Costs.
13. On contracts.
14. Conversion.
  - (1) In general.
  - (2) What is a conversion.
  - (3) Suits in individual capacity.
  - (4) Action must fail when.
15. For damages in causing death.
16. Ejectment.
17. To enforce trusts.
18. To recover excessive fees charged.
19. On foreign judgments.
20. Gifts.
21. For injunction.
22. For life insurance and sick benefits.
23. On mortgages.
24. Partition.
25. To quiet title, or to determine adverse claims.
26. Replevin.
27. To set aside fraudulent conveyances.
  - (1) In general.
  - (2) May be brought by special administrator when.
  - (3) May be brought by creditor when.
  - (4) Elements necessary to maintain.
28. Set-off and counterclaim.
29. For trespass on land.
30. Unlawful detainer.
31. Limitation of actions.
32. Termination of right to sue.

**III. Actions Against Executors or Administrators.**

1. In general.
2. Parties.
3. By distributees.
4. Against foreign executor or administrator.



5. Pleadings.
6. Evidence. Stipulations.
7. Judgments.
  - (1) In general.
  - (2) Must be payable in course of administration.
  - (3) Foreign judgments.
  - (4) Void if made after termination of office.
8. Costs.
9. Actions on accounts.
10. Attachment.
11. Suits on contracts.
  - (1) On contracts by decedent.
  - (2) On contracts by executor or administrator.
12. For conversion.
13. To recover deposit on void sale.
14. Ejectment.
15. Eminent domain.
16. To enforce trust.
  - (1) In general.
  - (2) Presentation of claims.
  - (3) Action by creditors.
  - (4) Collateral attack.
17. For fraud.
18. On mortgages.
19. To quiet title.
20. Replevin.
21. For torts.
  - (1) Acts done by the executor or administrator.
  - (2) Acts commenced before decedent's death.
22. Unlawful detainer.
23. To vacate sale.
24. For waste.
25. On street assessments.
26. Limitation of actions.
27. Appeals.

#### IV. Management of Estates.

1. In general.
2. Discovery of assets.
3. Advances by administrator.
4. Making improvements.
5. Investment of funds.
6. Effect of chattel mortgage.
7. Paying off liens. Redemption.
8. Other questions relating to mortgages.



9. Continuing business of decedent.
  - (1) In general.
  - (2) Exception to the rule.
  - (3) Individual liability.
  - (4) Liability created by court.
  - (5) Administrator's report and account.
10. Advice and instructions.

#### V. Estates Where Partnership Existed.

1. Interest of deceased partner. Assets of estate.
2. Presentation of claims.
3. Jurisdiction. Probate court. Equity.
4. Bequest of interest in firm. Payment of partnership debts.
5. Authority of executor or administrator.
6. Surviving partner as executor or administrator.
7. Surviving partner. Rights and powers.
8. Surviving partner. Settlement of partnership affairs.
9. Surviving partner. Completion of executory contracts.
10. Surviving partner. Accounting.
  - (1) In general.
  - (2) Court may compel accounting.
  - (3) Actions for accounting.
11. Accounts of executors may be settled, regardless of order.
12. Actions by or against surviving partners, and by or against executors or administrators.
  - (1) Actions by or against surviving partners.
  - (2) Actions by or against executors or administrators.
13. Purchase of deceased partner's interest.
14. New partnership. Carrying on decedent's business.
15. Conveyance by one partner to another. Death before payment.

### I. POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

#### 1. TITLE TO PROPERTY.

Under the laws of Arkansas in force in the Indian Territory at the time of the death of the intestate, neither an executor nor administrator has, as such, any interest in, title to, or control over the real estate of the decedent except for the purpose of the payment of debts: *Moseley v. McBride*, — Okla. —, 138 Pac. 138.

Executors hold all property of the estate for purposes of administration, including not only the rents and profits of lands specifically devised, but the land itself, and all of this



property is subject, if necessary, to disposition for the payment of expenses and debts: *Estate of DeBernal*, 165 Cal. 223, 131 Pac. 375. (See page 1026.)

## 2. BECOME TRUSTEES WHEN.

An executor is a trustee for the heirs and in no sense stands in the shoes of the deceased, that he is bound by the statute, and can not waive as against the heirs or devisees any requirement of the statute: *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 397. (See page 1026.)

## 3. EXECUTORS DE SON TORT. (See page 1027.)

## 4. DUTIES OF EXECUTORS AND ADMINISTRATORS.

Where the executors of a will are also appointed trustees of a portion of the estate, their duties as executors and trustees are separate, distinct, and independent of each other; and until the estate is settled or distributed, in whole or in part, their duties as executors continue as to the part not distributed and as to such part they do not assume the duties of trustees: *Jones v. Broadbent*, 21 Ida. 555, 123 Pac. 476.

It is the duty of an administrator with the will annexed to examine and if necessary oppose the accounts submitted for settlement by his predecessor in office. If technical or expert knowledge is necessary to make a proper examination, it is his duty to employ an expert accountant, and the expense of such employment is a proper charge against the estate: *Estate of Broome*, 162 Cal. 258, 122 Pac. 470.

Where the decree of final settlement of the claim and directing its payment has become final and conclusive as to all parties interested in the estate, it then becomes the final official duty of the administratrix to comply with the order directing her to pay the same, and the breach of such official duty is a breach of official trust which is not only conclusive upon the administratrix, but also, in the absence of fraud or collusion, is conclusive against the surety upon her official

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bond, who, by the terms of the bond is liable therefor: *L. Harter Co. v. Geisel*, 18 Cal. App. 282, 122 Pac. 1094.

An executor is a person appointed to carry the will into effect or execution after the death of the testator, and to dispose of the estate according to the tenor of the will: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 256. (See page 1027.)

## 5. POWER OF EXECUTORS AND ADMINISTRATORS.

(1) **In general.** Executor of administratrix does not succeed to her duties or powers as such: *Sanford v. Bergin*, 156 Cal. 43, 103 Pac. 333. (See page 1029.)

(2) **To dispose of personal property.** (See page 1030.)

(3) **To compound, or compromise, in general.** (See page 1031.)

(4) **Same. Restrictions. Approval of court.** (See page 1032.)

(5) **Same. Distinction.** (See page 1033.)

(6) **To bind estate.** An executor or administrator can not create any liability against the estate by the employment of the services of attorneys, brokers, or others, to assist him in the performance of his duties. The attorney, broker, or other person employed has no action or claim against the estate: *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 Pac. 1072.

Executor's contract employing brokers to sell realty of estate as authorized by will held his own individual contract: *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 Pac. 1072.

Court could not allow broker's commission for selling land under contract with executor: *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 Pac. 1072.

Representatives can not create any direct liability against estate by employment of attorneys, brokers, or others to



assist him in performance of his duties: *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 Pac. 1072.

Broker's right to commission held not affected by fact that court confirmed sale to purchaser produced by other brokers who bid higher sum, such brokers not having been employed by executor, and plaintiffs having fully performed: *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 Pac. 1072.

It is proper to disallow charges for money paid by executor for work done after decedent's death under contract which terminated at time of such death and also charges for work on a road after owner's death, work being unauthorized: *In re McPhee's Estate*, 156 Cal. 335, 104 Pac. 455.

Where, though under statute executor could defend will, his defense was solely for his own benefit and against other beneficiaries of estate so as to be of no benefit to estate, he was required to pay his own expenses and charges, and attorney's fees in such contest could not properly be allowed against estate: *In re Higgins' Estate*, 158 Cal. 355, 111 Pac. 8.

Code of Civil Procedure, Sec. 1616, entitles attorney only to such fees as are properly allowable to representative, and not to fees in will contest of no benefit to estate but merely for executor's advantage: *In re Higgins' Estate*, 158 Cal. 355, 111 Pac. 8.

Executrix held not entitled to allowance for expense of unjustifiable appeal from order making family allowance to minor beneficiaries: *In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446.

Fifty dollars' damages awarded in favor of children and against executrix personally: *In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446.

Under Code of Civil Procedure, Sec. 1619, to warrant allowance to representative for attorney's fees in litigation, such litigation must have been necessary to prosecute or defend: *In re Higgins' Estate*, 158 Cal. 355, 111 Pac. 8.



Finding below on question of necessity is not conclusive: *In re Higgins' Estate*, 158 Cal. 355, 111 Pac. 8.

Mere fact that statute authorizes executor to resist opposition to probate of will does not entitle him to attorney's fees: *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448.

Executor held not entitled to counsel fees incurred in unsuccessful attempt to prove will: *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448.

Executor's attorney held not entitled to fees out of estate for resisting contest of codicils where estate had no interest in contest and certain legatee was only person benefited by sustaining of codicils: *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448.

An executor may not bind the estate by an executory contract and thus create a liability not founded upon a contract or obligation of the testator: *Lawson v. Cobban*, 38 Mont. 138, 99 Pac. 130.

Where an administrator with others signed a contract to convey at a future time land belonging to the estate, he is personally liable for the breach of such contract whether he be regarded as having acted in his personal or representative capacity: *Lawson v. Cobban*, 38 Mont. 138, 99 Pac. 130. (See page 1034.)

**(7) Not to purchase claims against estate.** Though an administrator can not be allowed to acquire any interests inconsistent with the representative capacity he sustains nor be permitted to make a personal profit out of dealings with the property of the estate, yet he is not prevented from buying a legatee's interest in the estate so long as the transaction is fair and equitable and the administrator does not use the estate's money therein: *In re Goss' Estate*, 73 Wash. 330, 132 Pac. 410. (See page 1035.)

**(8) Not to purchase estate.** Long acquiescence by the parties interested will preclude them from objecting to the purchase by an administrator of property of the estate which purchase would have been improper if objected to



promptly: *Lewis v. Hill*, 61 Wash. 304, 112 Pac. 375. (See page 1036.)

(9) **Can not do what.** (See page 1037.)

(10) **With respect to leases and mortgages.** (See page 1038.)

(11) **Can not litigate what claims.** (See page 1039.)

(12) **In judicial proceedings.** (See page 1039.)

#### REFERENCES.

Right of personal representative of lessee to possession of leased premises under a lease to commence in futuro, see note 22 L. R. A. (N. S.) 301.

### 6. JOINT ADMINISTRATORS AND CO-EXECUTORS.

(1) **In general.** (See page 1039.)

(2) **Obligations and liability. Bond.** (See page 1039.)

(3) **Same. Foundation of liability.** (See page 1040.)

#### REFERENCES.

Right of continuing or surviving executor or administrator against former co-executor or administrator or latter's representative, see note 47 L. R. A. (N. S.) 995.

### 7. FOREIGN AND ANCILLARY ADMINISTRATION.

(1) **Foreign administration.** (See page 1041.)

(2) **Same. Ancillary administration.** Under Const., Art. 6, Sec. 6, of Arizona, providing that the superior court shall have original jurisdiction in all matters of probate, and par. 1598, Revised Statutes Arizona, 1901, providing that wills must be proved and letters testamentary or of administration granted in the county in which any part of the estate may be, the decedent having died out of the state and not resident thereof at the time of his death, the action of the superior court in appointing a foreign corporation, conceding it to be invalid, was ancillary administrator



of property in the state of a nonresident decedent dying without the state can not be attacked in a suit by the administrator to recover property of the decedent in the state: *Lincoln Trust Co. of New York v. Gaddis*, — *New Mex.* —, 139 *Pac.* 461.

Everything consistent with the probate record of the superior court which would have warranted it in appointing an ancillary administrator will be presumed to have been found and acted upon by the court: *Lincoln Trust Co. of New York v. Gaddis*, — *New Mex.* —, 139 *Pac.* 461. (See page 1042.)

#### REFERENCES.

Right of domiciliary executors and administrators or their nominees to ancillary letters, see note 48 *L. R. A. (N. S.)* 858.

### II. ACTIONS BY EXECUTORS OR ADMINISTRATORS.

#### 1. IN GENERAL.

In an action by an executrix who is sole devisee under a will of a testatrix executed several years before her death, to recover the value of land deeded by her while of unsound mind, and conveyed by the grantee, the defendant is estopped by a judgment in probate of the will pleaded by plaintiff, in the proceedings upon which it appears that defendant set up another will executed at the same time as the deed, devising the land to him, which he claimed as a revocation of the prior will, and also set up his deed as evidence of title, whereupon it was adjudged by the court that the first will was valid, and that the second will and deed were executed while the testatrix was of unsound mind and under the undue influence of the defendant, and he can not assert anything to the contrary of such judgment, in the subsequent action by the executrix: *Clapp v. Vatcher*, 9 *Cal. App.* 462, 99 *Pac.* 549.

Jurisdiction of court to appoint plaintiff suing for assets held not subject to question where due appointment is alleged in complaint and not denied in answer: *Shiels v. Nathan*, 12 *Cal. App.* 604, 108 *Pac.* 34.



On death of ward, action against guardian for accounting must be brought by ward's representative and not by his heirs: *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. (See page 1043.)

2. ABATEMENT. DISCONTINUANCE. (See page 1044.)

3. PARTIES. (See page 1044.)

4. BY ANCILLARY ADMINISTRATORS.  
(See page 1045.)

5. BY FOREIGN EXECUTORS OR ADMINISTRATORS.

A foreign administrator has not such an interest in the real estate of the decedent as will entitle him to maintain an action to determine an adverse claim thereto as required by section 675 of the Code of Civil Procedure and section 252, Probate Code: *Colburn v. Latham* (S. Dak.), 143 N. W. 278.

The courts of the state of Washington take no notice of foreign administration, and an executor or administrator, as such, can not sue or defend in the courts of that state: *In re Goss' Estate*, 73 Wash. 330, 132 Pac. 409.

A foreign administrator has no authority to sue outside of the state where he receives his appointment, but the objection goes rather to his capacity to sue or maintain an action than to the sufficiency of the cause of action or the jurisdiction of the court: *Whitley v. Spokane & T. Bldg. Co.*, 23 Ida. 642, 132 Pac. 127.

Where an action is brought against a nonresident executor of a foreign estate to recover commissions for the sale of lands in Kansas belonging to such foreign estate, and the lands in which the defendant has no interest other than as executor are attached and service obtained upon the executor by publication, and he files an answer defending for the estate, the court acquires no jurisdiction to render a judgment against him individually: *Edwards v. Puterbaugh*, 86 Kan. 758, 121 Pac. 1116. (See page 1045.)



## 6. EXECUTOR OR ADMINISTRATOR AS REPRESENTATIVE.

The representative capacity of an executor or administrator and his legal authority to represent the estate for which he is suing goes to the capacity of the plaintiff to maintain the action, rather than to the sufficiency of the facts to constitute a cause of action: *Anthes v. Anthes*, 21 Ida. 305, 121 Pac. 534. (See page 1047.)

## 7. BY A CO-EXECUTOR. (See page 1047.)

## 8. SUBSTITUTION. REVIVAL OF ACTION. (See page 1048.)

## 9. PLEADING.

The omission of the word "as" in the title of an action by an administrator is cured by clear and distinct averments in the complaint showing that the action is not brought by the administrator in his individual capacity: *Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261.

## 10. EVIDENCE. (See page 1050.)

## 11. JUDGMENT.

There is no privity between representatives of party of the same estate in different jurisdictions, and a judgment on a claim against one is not binding on the other, and has been held not even evidence against him. This is true whether or not the representatives are the same person, and applies to an action against any other person having assets of the decedent in a jurisdiction other than that in which the letters were granted: *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732.

Full faith and credit doctrine held inapplicable: *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732.

There is no distinction between executor or administrator c. t. a. and general administrator respecting effect of foreign



allowance or judgment and it is immaterial whether proceeding on claim is in personam or in rem: *Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732. (See page 1050.)

**12. COSTS.** (See page 1051.)

**13. ON CONTRACTS.** (See page 1051.)

**14. CONVERSION.**

(1) **In general.** Whenever a creditor obtains from a personal representative of a decedent's estate, under a mistake of fact, a sum of money on account of his demand which, *ex aequo et bono*, he ought not to receive, it may be secured in an action instituted for that purpose: *Thorson v. Hooper*, 57 Or. 75, 109 Pac. 389. (See page 1052.)

(2) **What is a conversion.** (See page 1053.)

(3) **Suits in individual capacity.** (See page 1053.)

(4) **Action must fail when.** (See page 1054.)

**15. FOR DAMAGES IN CAUSING DEATH.**

In an action for wrongful death under the Alaska Code of Civil Procedure, Sec. 353, providing that the amount recovered should be exclusively for the use of decedent's husband, wife, or children, and in default thereof to be administered as other personal property of a deceased person, the damages recoverable for wrongful death in the absence of wife or children, is the value of the decedent's life to the estate, measured by his earning capacity, thriftiness, and probable length of life: *Jennings v. Alaska Treadwell Gold Mining Co.*, 170 Fed. 151, 95 C. C. A. 388.

Inasmuch as it is "the heirs or personal representatives" of a deceased person who are authorized by section 4100 of the Revised Codes of Idaho to prosecute an action against a person wrongfully causing the death of such person and any judgment obtained in such action inures to the benefit of the "heirs" of the decedent and in no case becomes a part of the assets of the estate of the deceased, when there



are no heirs the action can not be maintained: *Whitley v. Spokane etc. Ry. Co.*, 23 Ida. 642, 132 Pac. 123.

The commencement and maintenance of an action to recover damages for wrongful death should be held to be within the scope of the powers and duties of a special administrator, as such powers and duties are defined by our statute. Although the moneys recovered in such an action do not constitute assets of the estate, they do constitute property which it is the right and duty of the personal representative of the deceased to collect for the benefit of the heirs, and the right to maintain an action for the recovery of the same is expressly conferred upon such personal representative: *Ruiz v. Santa Barbara Gas & Electric Co.*, 164 Cal. 188, 128 Pac. 330, 332.

The complaint in an action for wrongful death fails to state a cause of action, where it fails to allege that the deceased left any heir, an allegation absolutely essential in an action of this character: *Ruiz v. Santa Barbara Gas & Electric Co.*, 164 Cal. 188, 128 Pac. 330, 331.

In an action for wrongful death, it is proper to admit in evidence a map to locate the premises and as a diagram of the scene of the accident: *Foley v. Northern California P. Co.*, 165 Cal. 103, 130 Pac. 1183.

Although a right of action by the heirs for damages for the wrongful death of deceased was provided by section 377, Code of Civil Procedure, this right is limited by the provisions of section 1970, Civil Code, which is the last declaration of the legislature on the subject, and by this latter section such right of action is limited to the widow, children and dependent brothers and sisters, wherein it will be seen that there survives no right of action to a nephew of the deceased: *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989.

Under section 1970, Civil Code, which provides a right of action for wrongful death of an employee by the negligence of the employer in certain instances, the phrase "received as aforesaid" coming in the third clause of the statute has



reference to each of the foregoing clauses, and includes the negligence of a fellow-servant as well as defective appliances, etc.: *Pritchard v. Whitney Estate Co.*, 164 Cal. 564, 129 Pac. 989.

Section 377 of the Code of Civil Procedure gives a right of action for damages for the death of a person not a minor, caused by the wrongful act or neglect of another, to the "heirs or personal representatives" of the deceased. Section 1970 of the Civil Code, as amended in 1907 (Stats. 1907, p. 119), purports to give a right of action for and on behalf of "the widow, children, dependent parents, and dependent brothers and sisters," against an employer, for damages resulting from the death of an employee in certain cases, to "the personal representative of such employee." It is settled by the decisions that an action of the character authorized by section 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, by which they may be compensated for the pecuniary injury suffered by them by reason of the loss of their relative, that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs: *Ruiz v. Santa Barbara Gas & Electric Co.*, 164 Cal. 188, 128 Pac. 330, 331.

Money recovered for wrongful death is not an asset of the estate: *Jones v. Leonardt*, 10 Cal. App. 284, 101 Pac. 811.

An amended complaint in an action for wrongful death, brought by the widow of the deceased as administratrix, which alleges "that the deceased left at the time of his death surviving him his widow, who, as the administratrix of his estate and as his personal representative and as plaintiff, brings this action; that by reason of the premises the plaintiff as such administratrix has sustained damages in the sum of one hundred thousand dollars," is not subject to general demurrer because it does not allege that the suit is brought for the benefit of heirs or that there is any heir of the deceased; since not only is the widow an heir, but



section 1970 of the Civil Code expressly provides that the personal representative of the deceased may recover damages for the benefit of the widow: *Barr v. Southern Cal. Edison Co.*, 18 Cal. App. 279, 140 Pac. 47.

Nor is such complaint subject to general demurrer because it does not allege that the suit is brought for the benefit of the widow, for she could not maintain the action other than for the benefit of the heirs, for whom she acts as statutory trustee: *Barr v. Southern Cal. Edison Co.*, 18 Cal. App. 279, 140 Pac. 47.

The allegation in such complaint that the plaintiff has suffered damage as administratrix should be disregarded as surplusage: *Barr v. Southern Cal. Edison Co.*, 18 Cal. App. 279, 140 Pac. 47.

The failure of such complaint to allege in terms that the widow has sustained pecuniary damages does not render it subject to general demurrer, for the statute gives her the right to such damages as under the circumstances are just: *Barr v. Southern Cal. Edison Co.*, 18 Cal. App. 279, 140 Pac. 47.

The failure of such complaint to allege the amount of damages is not fatal, if it alleges facts from which damages must necessarily follow, and the prayer of the complaint is for a specific sum: *Barr v. Southern Cal. Edison Co.*, 18 Cal. App. 279, 140 Pac. 47.

Where the complaint in an action to recover for wrongful death fails to allege that the deceased left any heirs, and a demurrer thereto is sustained, an amended complaint, not purporting to contain a new cause of action, but merely showing that the deceased left surviving him a widow as his heir, may be filed after the statute of limitations has run against the cause of action: *Barr v. Southern Cal. Edison Co.*, 18 Cal. App. 279, 140 Pac. 47.

An action for the wrongful death of a nonresident may still be brought by the Kansas administrator of his estate under the original act conferring that authority, notwithstanding the passage of the supplemental act authorizing his



widow or next of kin to bring the action: *Cox v. Kansas City*, 86 Kan. 298, 120 Pac. 553.

If no personal representative has been appointed, the widow may maintain an action for damages for the death of her husband, and if, after commencing such action in due time, she is appointed administratrix of her husband's estate and she amends the petition accordingly, more than two years after the death, her action as administratrix is not barred by the two year statute of limitations: *Mott v. Long*, 90 Kan. 110, 132 Pac. 998. (See page 1054.)

#### REFERENCES.

As to actions for wrongful death, see note 70 Am. St. 669.

### 16. EJECTMENT. (See page 1055.)

#### REFERENCES.

As to the right of an executor or administrator to maintain ejectment regarding the lands of the deceased, see note to *Mayer v. Kornegay*, 136 Am. St. 81-86.

### 17. TO ENFORCE TRUSTS.

Trustees who are also executors may maintain a suit in equity for the judicial construction of the trusts of the will instead of leaving the matter to be disposed of by the probate court on the distribution of the estate: *Knox v. Knox*, 87 Kan. 381, 124 Pac. 410. (See page 1056.)

### 18. TO RECOVER EXCESSIVE FEES CHARGED.

Administrator's assignments of claims against city and county for illegal fees exacted for filing papers held not within Code of Civil Procedure, section 1517, requiring order of court to validate any sales of estate property, it being presumed probate court did not give them credit for such payments so that they were charged to them individually, giving them right to recover from city and county in their individual capacities: *Trower v. San Francisco*, 157 Cal. 762, 109 Pac. 617. (See page 1057.)



**19. ON FOREIGN JUDGMENTS. (See page 1057.)****REFERENCES.**

Right of domiciliary administrator to sue on judgment in another state, see note 39 L. R. A. (N. S.) 430.

**20. GIFTS. (See page 1057.)****21. FOR INJUNCTION. (See page 1058.)****22. FOR LIFE INSURANCE AND SICK BENEFITS.  
(See page 1058.)****23. ON MORTGAGES. (See page 1058.)****24. PARTITION. (See page 1059.)****25. TO QUIET TITLE OR TO DETERMINE ADVERSE  
CLAIMS.**

An administrator has sufficient interest in the property of the decedent to entitle him to bring an action to quiet title, under section 738, Code of Civil Procedure of the state of South Dakota: *Berry v. Howard*, 26 S. Dak. 32.

In an action by an administrator and heirs of a decedent to quiet title to land, where the defendant, cross-complainant, pleaded a former judgment of the same superior court quieting his title by publication against Bartels and the other defendants upon constructive service ordered by the court, it is held that the court properly excluded evidence of the appointment of the administrator, in order collaterally to assail the former judgment by showing that deceased was dead when the former suit was commenced. It is held that the exact date of his death was not essential to the order of appointment and was not concluded thereby: *Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860.

**REFERENCES.**

As to the right of the personal representative to maintain action to quiet title to the decedent's real estate, see note, *Ann. Cas.* 1913A, 996.



As to collateral attack on the right of one acting as executor or administrator, see note, 81 Am. St. 535.

The cross-complainant, not being a party to the probate proceeding, could not be bound thereby. Giving to the order of appointment the broadest scope possible under the law, it could only be conclusive between parties and their privies in respect of the matters directly adjudged; and those matters could only be those things necessary and essential in conferring jurisdiction and establishing the authority of the court to make the order: *Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860.

In suit by heirs and executor to recover realty conveyed by decedent shortly before his death, where evidence showed absence of claims against estate and expiration of time for presenting claims, executor could not recover unless decedent at time of his death had ownership and right of possession and land was subject to testamentary disposition: *Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551. (See page 1059.)

## 26. REPLEVIN. (See page 1060.)

## 27. TO SET ASIDE FRAUDULENT CONVEYANCES.

(1) **In general.** An administrator of an insolvent estate has no authority to bring a suit to set aside a conveyance of real estate made by the decedent in fraud of creditors: *Estate of Lopez*, 19 Haw. 620. (See page 1060.)

### REFERENCES.

As to the right of executors or administrators to set aside conveyances made by the deceased in fraud of creditors, see comprehensive note to the case of *Sifford v. Cutler*, 135 Am. St. 329-341.

(2) **May be brought by special administrator when.** (See page 1061.)

(3) **May be brought by creditor when.** Where a debtor conveyed property in alleged fraud of creditors, creditors can not, after his death, bring an action to set aside the con-



veyance without first having applied to the court for an order directing the administrator to bring the action, as provided by Secs. 1589 and 1590, C. C. P.: *Beswick v. Churchill Company*, 22 Cal. App. 404, 132 Pac. 771. (See page 1062.)

(4) **Elements necessary to maintain.** (See page 1063.)

28. **SET-OFF AND COUNTERCLAIM.** (See page 1064.)

29. **FOR TRESPASS ON LAND.** (See page 1066.)

30. **UNLAWFUL DETAINER.** (See page 1066.)

31. **LIMITATION OF ACTIONS.** (See page 1066.)

32. **TERMINATION OF RIGHT TO SUE.** (See page 1067.)

### III. **ACTIONS AGAINST EXECUTORS OR ADMINISTRATORS.**

1. **IN GENERAL.** (See page 1068.)

2. **PARTIES.** (See page 1068.)

3. **BY DISTRIBUTEES.** (See page 1069.)

4. **AGAINST FOREIGN EXECUTOR OR ADMINISTRATOR.** (See page 1070.)

5. **PLEADINGS.** (See page 1071.)

6. **EVIDENCE. STIPULATIONS.** (See page 1072.)

7. **JUDGMENTS.** (See page 1072.)

(1) **In general.** (See page 1072.)

(2) **Must be payable in course of administration.** (See page 1074.)

(3) **Foreign judgments.** (See page 1074.)

(4) **Void if made after termination of office.** (See page 1075.)



- 8. COSTS. (See page 1075.)**
- 9. ACTIONS ON ACCOUNTS. (See page 1075.)**
- 10. ATTACHMENT. (See page 1075.)**
- 11. SUITS ON CONTRACTS. (See page 1076.)**
  - (1) On contracts by decedent. (See page 1076.)**
  - (2) On contracts by executor or administrator. (See page 1077.)**
- 12. FOR CONVERSION. (See page 1078.)**
- 13. TO RECOVER DEPOSIT ON VOID SALE.  
(See page 1079.)**
- 14. EJECTMENT. (See page 1079.)**
- 15. EMINENT DOMAIN. (See page 1079.)**
- 16. TO ENFORCE TRUST. (See page 1079.)**
  - (1) In general. (See page 1079.)**
  - (2) Presentation of claims. (See page 1080.)**
  - (3) Action by creditors. (See page 1081.)**
  - (4) Collateral attack. (See page 1081.)**
- 17. FOR FRAUD. (See page 1081.)**
- 18. ON MORTGAGES. (See page 1082.)**
- 19. TO QUIET TITLE. (See page 1083.)**
- 20. REPLEVIN. (See page 1083.)**
- 21. FOR TORTS. (See page 1083.)**
  - (1) Acts done by the executor or administrator. (See page 1083.)**



(2) **Acts commenced before decedent's death.** (See page 1084.)

22. **UNLAWFUL DETAINER.** (See page 1085.)

23. **TO VACATE SALE.** (See page 1085.)

24. **FOR WASTE.** (See page 1085.)

25. **ON STREET ASSESSMENTS.** (See page 1086.)

26. **LIMITATION OF ACTIONS.** (See page 1086.)

27. **APPEALS.** (See page 1087.)

#### IV. MANAGEMENT OF ESTATES.

1. **IN GENERAL.** (See page 1088.)

2. **DISCOVERY OF ASSETS.** (See page 1089.)

The general rule that, where an action is brought against an executor or administrator to recover upon a claim for which he is or may be liable individually, the use of the words "executor" or "administrator" in the pleadings will be regarded as words of description and rejected as surplusage has no application to a case where it conclusively appears that the action was brought against the person in his representative capacity alone: *Edwards v. Peterbaugh*, 86 Kan. 758, 121 Pac. 1116.

3. **ADVANCES BY ADMINISTRATOR.**

Advancements by the administrator to a beneficiary in the nature of personal loans are chargeable only against the distributive portion of the estate found to be due to such beneficiary: *Elizalde v. Murphy*, 163 Cal. 681, 126 Pac. 978, 981.

Good faith expenditure for benefit of estate and duly allowed will not be reviewed unless there is no ground in record on which it can be supported: *In re Bottom's Estate*, 156 Cal. 129, 103 Pac. 849.



Payment by administratrix of share of amount necessary for administration expenses on death of vendor of realty, in order to secure conveyance of land contracted for by her decedent instead of proceeding to compel conveyance by vendor's administrator, held justifiable and properly allowable as a credit: *In re Bottom's Estate*, 156 Cal. 129, 103 Pac. 849.

Where court could have granted administrator permission to pay out money to complete purchase of realty, such payment without permission was not improper, but merely left propriety open on settlement of account: *In re Bottom's Estate*, 156 Cal. 129, 103 Pac. 849.

While it is not in the power of an executor or administrator by advances made by him to the estate to thereby make the estate his debtor regardless of the character or equity of his claim, yet advances made suitably and in good faith for the benefit of the estate may be allowed as a claim against the estate, and section 7542, Revised Codes, provides the method of allowing such a claim: *In re Williams' Estate*, 47 Mont. 325, 132 Pac. 423.

While an executor or administrator is to be reimbursed for payments made upon distributive shares, the credits therefor are not to be given upon the settlement of accounts, but are to be retired therefrom, and considered only upon the distribution of the estate. This rule will apply to all advancements made to the heirs by the administrator: *In re Loheide*, 17 Cal. App. 475, 120 Pac. 56. (See page 1089.)

#### 4. MAKING IMPROVEMENTS.

It is within the province of an executor to make such expenditures on a building which was being erected by the decedent at the time of his death as may be reasonably necessary to preserve it pending administration. It is not his duty to complete the building: *Estate of Hincleon*, 159 Cal. 755, 116 Pac. 47.

A devise of real property, described in the will as being property on which "is situate a cottage in course of con-



struction," can not be construed as a direction by the testator that the completion of the building should be a charge upon his estate: *Estate of Hinchon*, 159 Cal. 755, 116 Pac. 47.

While it is the duty of executors to perform valid and uncompleted contracts which have been entered into by their testator, they are not called on, nor have they the right, to expend the funds of the estate for the doing of new work which the testator himself was not bound to do. Such expenditure, unless incurred for the preservation of the property of the decedent, is not a charge upon the estate. This rule applies to a building which was being erected by the testator by day's labor, as to which there were no unfinished contracts outstanding. The fact that the testator believed that the building was substantially completed is immaterial: *Estate of Hinchon*, 159 Cal. 755, 116 Pac. 47. (See page 1090.)

#### REFERENCES.

Right of devisee or heir to completion of improvements at the expense of the estate, see note 36 L. R. A. (N. S.) 303.

### 5. INVESTMENT OF FUNDS.

A representative who invests funds of the estate in his own name instead of collecting securities representing such funds thereby creates himself a debtor to the estate, and as bearing on his liability it is immaterial whether he was or was not negligent in collecting the securities taken in his own name: *Elizalde v. Murphy*, 11 Cal. App. 32, 103 Pac. 904.

Rule applied where he took note in his own name in lieu of notes belonging to estate: *Elizalde v. Murphy*, 11 Cal. App 32, 103 Pac. 904. (See page 1090.)

### 6. EFFECT OF CHATTEL MORTGAGE.

Where a chattel mortgage provided that on condition broken the mortgagee might take possession of the property; on refusal to yield possession replevin will lie against the



administrator of the mortgagor: *Western Newspaper Union v. Thurmond*, 27 Okla. 261, 111 Pac. 204. (See page 1091.)

#### 7. PAYING OFF HEIRS. REDEMPTION.

(See page 1091.)

#### 8. OTHER QUESTIONS RELATING TO MORTGAGES.

The foreclosure proceedings had by the administrator subsequent to the death of the deceased, whereby the mortgage indebtedness was converted into real estate and title vested in him, did not relieve it of the burden of being sold, as provided in section 1523 of the Code of Civil Procedure, and the amendment of 1893, imposing the same burden upon the land did not impair any vested rights that the heirs had therein: *Estate of Bazzuro*, 161 Cal. 72, 118 Pac. 434. (See page 1092.)

#### 9. CONTINUING BUSINESS OF DECEDENT.

(1) **In general.** If the heirs and devisees desire to continue the business of the ancestor undivided, they should first have the estate closed, as provided by law, and take over the business individually. It is not the affair of the administrator to continue the business as a part of the administration, and the court has no authority to authorize or permit him to do so: *In re S. Marks & Co.'s Estate*, 66 Or. 340, 133 Pac. 778. See, also, *In re Marks & Wollenberg's Estate*, 66 Or. 347, 133 Pac. 779.

It is no part of the duty or authority of an administrator with the will annexed to manage the property of the estate for the benefit of the heirs. So far as they are concerned it is simply his duty to preserve the estate until distribution: *Estate of Broome*, 162 Cal. 258, — Pac. —.

Where an administrator, without authority of law, carries on the business of the deceased, he is chargeable with all the losses thereby incurred: *Western Newspaper Union v. Thurmond*, 27 Okla. 261, 111 Pac. 205. (See page 1093.)

(2) **Exception to the rule.** (See page 1094.)



(3) **Individual liability.** (See page 1094.)

(4) **Liability created by court.** (See page 1095.)

(5) **Administrator's report and account.** (See page 1095.)

10. **ADVICE AND INSTRUCTIONS.** (See page 1096.)

**V. ESTATES WHERE PARTNERSHIP EXISTED.**

1. **INTEREST OF DECEASED PARTNER. ASSETS OF ESTATE.** (See page 1097.)

2. **PRESENTATION OF CLAIMS.** (See page 1097.)

3. **JURISDICTION. PROBATE COURT. EQUITY.**

The probate court has full power to try the issue of partnership or no partnership when raised on an application by one claiming as surviving partner, the right to administer the partnership estate under the provisions of Rem. & Bal. Code, Secs. 1436, 1437, 1438: *State v. Superior Court*, 76 Wash. 291, 136 Pac. 152.

If an administrator is appointed and fails to file an inventory of the partnership estate as required by the law of New Mexico the surviving partner can compel same: *Dow v. Jimpson*, 17 N. M. 357, 132 Pac. 568. (See page 1098.)

4. **BEQUEST OF INTEREST IN FIRM. PAYMENT OF PARTNERSHIP DEBTS.** (See page 1099.)

5. **AUTHORITY OF EXECUTOR OR ADMINISTRATOR.** (See page 1100.)

6. **SURVIVING PARTNER AS EXECUTOR OR ADMINISTRATOR.** (See page 1100.)

7. **SURVIVING PARTNER. RIGHTS AND POWERS.**

The method provided by chapter 81, Session Laws 1901 of New Mexico, for winding up partnership affairs on the death



of a partner, is exclusive, and until the appointment and qualification of an administrator of the partnership, the surviving partners have no power to sell or dispose of the partnership assets: *Dow v. Jimpson*, 17 N. Mex. 357, 132 Pac. 568. (See page 1101.)

**8. SURVIVING PARTNER. SETTLEMENT OF PARTNERSHIP AFFAIRS. (See page 1103.)**

**9. SURVIVING PARTNER. COMPLETION OF EXECUTORY CONTRACTS. (See page 1104.)**

**10. SURVIVING PARTNER. ACCOUNTING.**

**(1) In general. (See page 1105.)**

**(2) Court may compel accounting. (See page 1105.)**

**(3) Actions for accounting. (See page 1106.)**

**11. ACCOUNTS OF EXECUTORS MAY BE SETTLED, REGARDLESS OF ORDER. (See page 1106.)**

**12. ACTIONS BY OR AGAINST SURVIVING PARTNERS AND BY OR AGAINST EXECUTORS OR ADMINISTRATORS. (See page 1107.)**

**(1) Actions by or against surviving partners. (See page 1107.)**

**(2) Actions by or against executors or administrators. (See page 1107.)**

**13. PURCHASE OF DECEASED PARTNER'S INTEREST. (See page 1107.)**

**14. NEW PARTNERSHIP. CARRYING ON DECEDENT'S BUSINESS. (See page 1108.)**

**15. CONVEYANCE BY ONE PARTNER TO ANOTHER. DEATH BEFORE PAYMENT. (See page 1108.)**







## **PART XI.**

### **LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS. ATTORNEYS' FEES. ACCOUNTING AND SETTLEMENTS. PAYMENT OF DEBTS.**

#### **CHAPTER I.**

##### **LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS. ATTORNEYS' FEES.**

- § 651. Compensation of representative and attorney. Appeal.**
- § 653. Executor. Commission allowed. Administrator. Extraordinary services.**
- § 655. Allowance of fees for attorneys. Extraordinary services**

##### **LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS. ATTORNEYS' FEES.**

###### **I. Liability of Executors and Administrators.**

- 1. In general.**
- 2. Instances of liability.**
  - (1) For entire estate.**
  - (2) Liability in general.**
  - (3) In what capacity.**
  - (4) Liability for costs.**
  - (5) Contracts.**
  - (6) Mingling trust funds.**
  - (7) Rents, issues and profits.**
  - (8) Bad loans.**
  - (9) Failure of bank.**
  - (10) Failure to collect.**
  - (11) Losses through neglect.**
  - (12) Personal injuries. Conduct of decedent's business.**
  - (13) Liability for taxes.**
- 3. Instances of nonliability.**
- 4. When chargeable with interest.**
  - (1) In general.**
  - (2) Simple interest.**
  - (3) Compound interest.**



5. Not to profit or lose by estate.

## II. Compensation of Executors and Administrators.

1. Provision for, in will.
2. Statutory allowance.
3. Basis. Computation.
4. Validity of agreement as to.
5. Not allowable until final settlement. Allowance on account.
6. Renunciation. Waiver.
7. What should be allowed.
8. What should not be allowed.
9. Further allowance. Extra services.
10. Co-executors.
11. Successive administrators.
12. Trustees.
13. Special administrators.
14. Appeal.

## III. Attorneys' Fees.

1. In general.
2. Province of court.
3. Statutory provisions.
4. Estate not chargeable.
5. Necessity of notice.
6. What is no waiver of fee.
7. Personal liability for.
8. What may properly be allowed.
9. What can not be allowed.
10. Reasonableness of fee.
11. Co-executors and special administrators.
12. Recovery of fee.
13. Recovery of more than amount allowed.
14. Appeal.

**§ 651. Compensation of representative and attorney.**  
**Appeal.** The executor or administrator shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless by a written instrument, filed in the court, he renounces all claim for compensation provided for in the will. At any time after one year from the admission of



a will to probate, or the granting of letters of administration, any executor, or administrator, may, upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself upon his commissions, and the court shall on the hearing of such application make an order allowing such executor or administrator such portion of his commissions as to the court shall seem proper, and the portion so allowed may be thereupon charged against the estate. Any attorney who has rendered services to an executor or administrator may at any time during the administration, and upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself of compensation therefor, and the court shall on the hearing of such application make an order requiring the executor or administrator to pay to such attorney out of the estate such compensation on account of services rendered by such attorney up to the date of such order as to the court shall seem proper, and such payment shall be forthwith made.

Any attorney making such application to the court for compensation and all other persons interested in the estate may appeal from any order made by the court fixing the amount of such compensation, and ordering the same paid. —Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1906), § 1616.

**§ 653. Executor, commission allowed. Administrator. Extraordinary services.** When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; for the next fifty thousand dollars, at the rate of one per cent; and for all above one hundred thousand dollars, at the rate of one-half of one per cent. If there are two or



more executors the compensation shall be apportioned among them by the court according to the services actually rendered by them respectively. The same commissions shall be allowed to administrators. In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed one-half the amount of commissions allowed by this section. Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commission shall be computed on all the estate above the value of twenty thousand dollars, at one-half of the rates fixed in this section. Public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators. All contracts between an executor or administrator and an heir, devisee or legatee, for a higher compensation than that allowed by this section, shall be void.—**Kerr's Cyc. Code Civ. Proc.** (**Kerr's Cum. Supp.**, p. 1907), § 1618.

**§ 655. Allowance of fees for attorneys. Extraordinary services.** Attorneys for executors and administrators shall be allowed out of the estate as fees for conducting the ordinary probate proceedings the same amounts as are allowed by the last section as compensation for executors and administrators for their own services. In all cases such further allowance may be made as the court may deem just and reasonable for any such extraordinary services such as sales or mortgages of real estate, contested or litigated claims against the estate, litigation in regard to the property of the estate, and such other litigation as may be necessary for the executor or administrator to prosecute or defend.—**Kerr's Cyc. Code Civ. Proc.** (**Kerr's Cum. Supp.**, p. 1907), § 1619.



**I. LIABILITY OF EXECUTORS AND ADMINISTRATORS.****1. IN GENERAL. (See page 1116.)****2. INSTANCES OF LIABILITY.****(1) For entire estate. (See page 1117.)**

**(2) Liability in general.** The right which the law confers upon an administrator to take and hold the possession of the goods and chattels of a decedent's estate is in the nature of a trust and an administrator is authorized to enforce all the rights and is subject to all the remedies, incident to an ordinary trustee. He is not a trustee in the strict sense of the term, but he exercises a statutory power pursuant to the orders of a probate court: *Thorson v. Hooper*, 57 Or. 75, 109 Pac. 389. (See page 1117.)

**REFERENCES.**

As to general nature of the liability of executors or administrators, see note to the case of *Bannigan v. Woodbury*, 133 Am. St. 373.

**(3) In what capacity.** The collection by a widow and administratrix of her husband's entire estate and her removal of it out of the state and it being more than amply sufficient to pay all debts renders her personally liable in an action by a creditor of the estate: *Brown Eastes v. Walley*, 51 Colo. 166, 117 Pac. 138.

The indebtedness of the administrator to the estate, when he is also an heir, and as such interested in the estate, may be deducted from his distributive share. It can not be applied to the detriment of the estate or to the rights of other heirs or distributees. Where new notes were given by the administrator to a company representing the heirs upon distribution to keep them from outlawing against the estate, they are to be treated as his personal debt, and not intended or received as an advance upon the distributive shares of any other heirs, but as being only a charge upon his distributive share where there is nothing to indicate a contrary intent: *In re Loheide*, 17 Cal. App. 475, 120 Pac. 56. (See page 1119.)



- (4) **Liability for costs.** (See page 1119.)
- (5) **Contracts.** (See page 1120.)
- (6) **Mingling trust funds.** (See page 1122.)
- (7) **Rents, issues and profits.** (See page 1122.)
- (8) **Bad loans.** (See page 1122.)
- (9) **Failure of bank.** (See page 1122.)
- (10) **Failure to collect.** (See page 1123.)

#### REFERENCES.

Personal liability of executor, administrator, or trustee on covenant in deed executed by him, see note 43 L. R. A. (N. S.) 377.

(11) **Losses through neglect.** Where the law imposes a duty on an administrator or an executor, and he neglects to discharge the obligation thus enjoined, whereby another sustains an injury, the personal representative is personally liable therefor: *Fetting v. Winch*, 54 Or. 600, 104 Pac. 723.

(12) **Personal injuries. Conduct of decedent's business.** An action can not be maintained against an executor or administrator in his representative character while administering the estate for a wrongful act committed by him whereby a personal injury is inflicted upon another. As the act is beyond the scope of his official authority he must be sued as an individual: *Fetting v. Winch*, 54 Or. 600, 104 Pac. 723. (See page 1124.)

- (13) **Liability for taxes.** (See page 1125.)

#### REFERENCES.

Personal representative or testamentary trustee carrying on business, see note 40 L. R. A. (N. S.) 201.

Liability of executor or administrator for personal injury resulting from negligence in care or management of property of estate, see note 38 L. R. A. (N. S.) 379.



### 3. INSTANCES OF NONLIABILITY.

Upon the death of one judgment debtor, the other succeeds to the joint obligation of the judgment, and he is liable alone and not jointly with the executors or administrators of the deceased judgment debtor. The executors and administrators are not liable at law in such case: *Smithies v. Colburn*, 20 Haw. 138. (See page 1125.)

### 4. WHEN CHARGEABLE WITH INTEREST. (See page 1126.)

- (1) **In general.** (See page 1126.)
- (2) **Simple interest.** (See page 1128.)
- (3) **Compound interest.** (See page 1129.)

### 5. NOT TO PROFIT OR LOSE BY ESTATE.

## II. COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

### 1. Provision for in will. (See page 1132.)

**2. Statutory allowance.** Whether a will be construed as an ordinary one or a nonintervention one will not affect the right of the executor to the statutory compensation: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 257.

Under the language of sections 1618 and 1619 of the Code of Civil Procedure, the general administrator of an estate and his attorney are entitled to the fixed percentage therein provided, and the court can not diminish the same by the deduction of any previous allowance made to a special administrator and his attorney: *Estate of Miller*, 15 Cal. App. 557, 115 Pac. 329. (See page 1132.)

### 3. Basis. Computation. (See page 1133.)

### 4. Validity of agreement as to. (See page 1135.)

**5. Not allowable until final settlement. Allowance on account.** Under the administration laws of the state of Washington the fixing of compensation of executors and



administrators is a subject for determination upon settlement of the final account and is appealable on the ground that it is a final adjudication as to such allowance: *In re Doane's Estate*, 64 Wash. 303, 116 Pac. 849.

Section 1616 of the Code of Civil Procedure as amended in 1911 contemplates an allowance to an executor or administrator on account of his commissions before the administration is completed, and this rule is applicable to an executor who dies or is removed, as well as to one who continues in office: *Estate of Jones*, 166 Cal. 147, 135 Pac. 293. (See page 1135.)

**6. Renunciation. Waiver.** (See page 1136.)

**REFERENCES.**

As to right to extra compensation for extraordinary services, see note in *Ann. Cas.* 1913A, 87.

**7. What should be allowed.** Usually the only services for which an administrator or executor will be allowed compensation are such as are beneficial to the estate. This, however, does not mean that when the result of services undertaken in good faith is not of pecuniary or other benefit, but rather results in loss, such services should not be compensated: *In re Lichtenberg's Estate*, 58 Wash. 585, 109 Pac. 49. (See page 1136.)

Commissions based on amount of estate accounted for held not allowable until settlement of final account: *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448.

**8. What should not be allowed.** (See page 1138.)

**9. Further allowance. Extra services.** If an executor undertakes the management of the estate on behalf of the heirs and loss results he is chargeable with that loss. If upon the other hand, profit over and above normal results from his endeavors he is entitled to an allowance from the estate by way of compensation for extraordinary services under section 1618 California Code of Civil Procedure: *Estate of Broome*, 162 Cal. 258, 122 Pac. 470.



Under provisions in a will embodied in the decree distributing the testator's estate, directing that the trust estate shall be held by the trustee "for a period of five years from and after the date of the entry of this decree of distribution" and that the trustees shall receive a fixed annual compensation "during the full term of their trusteeship," the trustees are entitled to receive such compensation for the period of five years only. If by reason of the failure to formally enter the decree of distribution immediately upon its rendition, or for other reasons the duration of the trust is prolonged, the right of the trustees to compensation for the additional time should not rest upon the terms of the trust, but upon an award of the court in quantum meruit: *Estate of Hanson*, 159 Cal. 401, 114 Pac. 810.

In fixing the compensation of an executor the probate court may take into consideration the fact that he has performed services as a lawyer by which expense to the estate has been saved: *Nelson v. Schoonover*, — Kan. —, 132 Pac. 1184.

The court properly disallowed the account of the administrator and his attorney for extra services. The allowance or disallowance of the same is within the discretion of the court, and its exercise in disallowing the account does not call for any revisory action by this court: *Estate of Miller*, 15 Cal. App. 557, 115 Pac. 329. (See page 1139.)

**10. Co-executors.** (See page 1140.)

**11. Successive administrators.** The apportionment allowed between joint or successive administrators and their attorneys under sections 1618 and 1619 of the Code of Civil Procedure applies only to cases of general administration: *Estate of Miller*, 15 Cal. App. 557, 115 Pac. 329. (See page 1141.)

**12. Trustees.** Under provisions in a will, embodied in the decree distributing the testator's estate, directing that a trust estate shall be held by the trustees "for a period of five years from and after the date of the entry of this decree of distribution," and that the trustees shall receive a fixed



annual compensation "during the full term of their trusteeship," the trustees are only entitled to receive the compensation fixed by the will for the period of five years. If by reason of the failure to formally enter the decree of distribution immediately upon its rendition, or for other reasons, the duration of the trust is prolonged, the right of the trustees to compensation for the additional term should rest not upon the terms of the trust, but upon an award of the court in quantum meruit: *Estate of Hanson*, 159 Cal. 401, 114 Pac. 810.

Where a petition by one of three trustees for a termination of the trust is successfully opposed by the others, the action of the resisting trustees must be held to have been the successful defense of the trust, and their legitimate and necessary disbursements in this regard, such as attorney's fees, are chargeable against the trust property: *Estate of Hanson*, 159 Cal. 401, 114 Pac. 810.

The fact that the court, upon the first accounting by the trustees, allowed them the compensation fixed by the will for a period of time intervening between the date of the rendition of the decree, when the trust actually commenced, and the date of the entry of the decree, is not determinative of their right to future compensation: *Estate of Hanson*, 159 Cal. 401, 114 Pac. 810. (See page 1142.)

**13. Special administrators.** (See page 1142.)

**14. Appeal.** (See page 1142.)

### III. ATTORNEYS' FEES.

**1. In general.** (See page 1143.)

### REFERENCES.

Right of executor to allowance for attorney's fee for services rendered in attempt to establish, or resist attack upon, will, see note 26 L. R. A. (N. S.) 757.

Liability of estate to attorney employed by executor or administrator, see 25 L. R. A. (N. S.) 72.



**2. Province of court.** The proper fee to be awarded attorneys in probate proceedings is a difficult matter to be determined. Hence it is one of those matters which must rest largely in the sound discretion of the trial court and should not be interfered with except for a manifest abuse of such discretion: *In re Lichtenberg's Estate*, 58 Wash. 585, 109 Pac. 49.

On application of attorney for compensation for other than ordinary probate services, court has same discretion as in allowing executor for fees by him already paid out: *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448. (See page 1144.)

**3. Statutory provisions.** Prior to the amendment of 1905 to section 1616, Code of Civil Procedure, the attorney of an executor or administrator was not a party interested in the estate of a deceased person and must look solely to the executor or administrator for his compensation, such officer being allowed credit on his accounting for such reasonable fees as he had paid his attorney: *Estate of Hite*, 155 Cal. 448, 101 Pac. 448.

Only purpose of Code Civ. Proc., Sec. 1616, authorizing attorney to apply for order allowing compensation for services rendered to representative, was to enable attorney to obtain compensation directly, and did not alter liability of estate: *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448. (See page 1145.)

**4. Estate not chargeable.** (See page 1146.)

**5. Necessity of Notice.** (See page 1148.)

**6. What is no waiver of fee.** (See page 1149.)

**7. Personal liability for.** Attorneys employed by an administrator to assist him in administering his trust, or to prosecute or defend an action for or against him in his official capacity, have no claim they can enforce directly against the estate. The administrator is individually liable for such services, and upon settlement of his accounts he may be reimbursed out of the estate for attorney's fees



necessarily paid out as expenses of administration: *Brown v. Quinton*, 80 Kan. 44, 102 Pac. 242. (See page 1149.)

**8. What may properly be allowed.** An attorney can obtain by an application for fees for legal services made under section 1616 of the Code of Civil Procedure only such sums as are properly allowable to the executor or administrator as necessary expenses in the discharge of his duties: *Estate of Higgins*, 158 Cal. 355, 111 Pac. 8.

Under exceptional circumstances the unsuccessful appellants from a decree of the supreme court of the Territory of Hawaii to the supreme court of the United States are allowed counsel fees and expenses from the estate: *Fitchie v. Brown*, 19 Haw. 411. (See page 1151.)

**9. What can not be allowed.** (See page 1152.)

**10. Reasonableness of fee.** An allowance to an executor of \$2500 for counsel fees in an estate appraised at upwards of \$37,000 is not excessive: *In re Witt's Estate*, 72 Wash. 172, 132 Pac. 1013.

In an estate of \$600,000, having regard to the amount and responsibility of the work done, an attorney's fee of \$13,000 is excessive and \$8750 is reasonable and adequate: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 257. (See page 1154.)

**12. Recovery of fee.** (See page 1155.)

**13. Recovery of more than amount allowed.** (See page 1157.)

**14. Appeal.** An order directing the payment of attorney's fees incurred by an unsuccessful proponent of a will, payable out of the assets of the estate, is an order directing the payment of a claim against the estate, and under subdivision 3 of section 963, or under section 1616, Code of Civil Procedure, is an appealable order. Prohibition will not lie to restrain the making of such order: *Mousnier v. Superior Court*, 159 Cal. 663, 115 Pac. 221.



Under Code of Civil Procedure, Sec. 1616, attorney may appeal from order denying compensation for services rendered administrator: *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448. (See page 1157.)



## CHAPTER II.

### ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS.

§ 672. Vouchers for items less than twenty dollars.

§ 697. Deceased executor's accounts.

### ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS.

1. In general.
2. Duty to account.
3. Notice of settlement.
4. Account must show what.
5. Order for payment of dividend.
6. Vouchers.
7. Hearing.
  - (1) In general.
  - (2) Matters not to be considered.
8. Exemptions. Contest. Objections. Evidence.
  - (1) In general.
  - (2) Exceptions as aid to court.
  - (3) Right to appear and contest.
  - (4) Contest of allowed claim.
  - (5) Manner of stating objections. Facts.
  - (6) Purpose of statute. Practice. Pleadings. Issues.
  - (7) Additional or amended exceptions.
  - (8) Untenable objections.
  - (9) Evidence. Burden of proof. Presumptions.
9. Power and duty of court.
  - (1) In general.
  - (2) As to notice.
  - (3) To scrutinize accounts.
  - (4) In absence of exceptions.
  - (5) Report of referee.
  - (6) To compel accounting.
  - (7) Striking. Combining. Making more specific.
  - (8) Want of jurisdiction.
10. Administrator to be charged with what.
11. Administrator not chargeable when.
12. Administrator is entitled to credit for what.
  - (1) In general.
  - (2) Payments made for preservation or protection of estate.
  - (3) Same. Necessary expenditures



- (4) For costs paid.
- (5) Funeral expenses. Last illness.
- (6) Payment of family allowance.
- (7) Traveling expenses.
- (8) Items for less than twenty dollars.
- 13. Administrator is not entitled to credit when.
  - (1) In general.
  - (2) Improper charges.
  - (3) Unnecessary expenditures.
  - (4) Expenses before administration.
  - (5) Repairs. Protection of estate.
- 14. Final and intermediate accounts. Waiver.
- 15. Failure to settle.
- 16. Death or absconding before accounting.
- 17. Insolvent administrators.
- 18. Trial by jury.
- 19. Validity of settlement.
- 20. Effect of settlement.
- 21. Conclusiveness of settlement.
  - (1) In general.
  - (2) Items included. Items omitted.
- 22. Vacating accounts. Collateral attack. Relief in equity.
  - (1) In general.
  - (2) Void decree, only, may be vacated.
  - (3) Can not be set aside for "mistake," etc., when.
  - (4) Collateral attack.
  - (5) Equitable relief. In general.
  - (6) Equitable relief for fraud or mistake.
- 23. Appeal.
  - (1) In general.
  - (2) Appealable orders.
  - (3) Nonappealable orders.
  - (4) Parties. Representative.
  - (5) Notice.
  - (6) Findings. Bill of exceptions. Record.
  - (7) Sufficiency of judge's certificate.
  - (8) Consideration of case. Review.
  - (9) Affirmance. Remanding. Reversal. Dismissal. Remittitur.

**§ 672. Vouchers for items less than twenty dollars.** On the settlement of his account he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such al-



lowances in the whole must not exceed five hundred dollars against any one estate, provided, that if it appears by the oath to the account and is proven by competent evidence, to the satisfaction of the court, that a voucher for any disbursement or disbursements whatsoever, has been lost or destroyed, and that it is impossible to obtain a duplicate thereof and that such item or items were paid in good faith and for the best interests of the estate, and such item or items were legal charges against said estate, then the executor or administrator shall be allowed such item or items.

If, upon such settlement of accounts, it appears that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or Secs. 1494, 1495, and 1496 of this code, and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or setoffs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1910), § 1632.**

**§ 697. Deceased executor's accounts.** If any executor, administrator or guardian dies, his accounts may be presented by his personal representative to, and settled by, the court in which the estate of which he was executor, administrator or guardian is being administered, and, upon petition of the successor of such deceased executor, administrator or guardian, such court may compel the personal representatives of such deceased executor, administrator or guardian to render an account of the administration of their testator or intestate, and must settle such account as in other cases.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1912), § 1639.**

### 1. IN GENERAL.

The superior court, sitting in probate on proceedings for the settlement of the accounts of an executor, has jurisdic-



tion to determine all issues necessarily incidental thereto, including an issue as to the title to a fund in the hands of the executor which he claimed belonged to him in his individual capacity: *Stevens v. Superior Court*, 155 Cal. 148, 99 Pac. 512. (See page 1198.)

## 2. DUTY TO ACCOUNT. (See page 1198.)

## 3. NOTICE OF SETTLEMENT.

Sections 5000 and 5598, Revised Codes of Idaho, clearly provide for the fixing of a day for hearing a final settlement filed by an administrator and require the probate judge to appoint a day for settlement and that notice must be given at which time any person interested in the estate may appear and file exceptions to the account and contest the same: *Kent v. Dalrymple*, 23 Ida. 694, 132 Pac. 304.

The failure of an administrator to publish notice of final settlement does not affect the right of one appearing without notice: *Emelle v. Spinner*, 20 Wyo. 507, 126 Pac. 398. (See page 1200.)

## 4. ACCOUNT MUST SHOW WHAT.

A decree settling an annual account of the administrator of an estate of a deceased person, filed under section 1622 of the Code of Civil Procedure, need not charge the administrator with the entire property in his hands, but may simply determine the accuracy of his accounts as to money transactions which he has had with the estate. As to all other items of property belonging to the estate an accounting is to be made upon final settlement: *Estate of Bottoms*, 156 Cal. 129, 103 Pac. 849.

Where the decedent had a possessory right to two ranches and the executor sold the same by a verbal sale and claimed to retain the purchase money as his own on the grounds that the sales were void and that the property still remained to the estate in specie it was held that he must account for the money to the estate: *Candelaria v. Meera*, — N. Mex. —, 134 Pac. 832. (See page 1200.)



**5. ORDER FOR PAYMENT OF DIVIDEND.**

(See page 1201.)

**6. VOUCHERS. (See page 1201.)****7. HEARING.**

(1) **In general.** Under sections 7661, 7662, Revised Codes of Montana, it is very clear that a final account of an administrator or executor can not be settled or approved so long as there are claims outstanding against the estate, if there is any property in the hands of the executor or administrator available for the payment thereof: *In re Williams' Estate*, 47 Mont. 325, 132 Pac. 423.

Before a final account can be approved the executor must show affirmatively that he has paid all outstanding claims against the estate or that he has exhausted the property available for such purpose: *In re Williams' Estate*, 47 Mont. 325, 132 Pac. 423. (See page 1202.)

(2) **Matters not to be considered.** (See page 1203.)

**8. EXCEPTIONS. CONTEST. OBJECTIONS.  
EVIDENCE.**

(1) **In general.** (See page 1205.)

**REFERENCES.**

Right of executor or administrator or his representatives to object to account of co-executor or co-administrator, see note 22 L. R. A. (N. S.) 1119.

(2) **Exceptions as aid to court.** (See page 1205.)

(3) **Right to appear and contest.** (See page 1205.)

(4) **Contest of allowed claim.** (See page 1206.)

(5) **Manner of stating objections. Facts.** Where objections to the account of an administrator are separated into paragraphs, each stating the objection to a simple point or feature of the account, a report of the referee appointed to



settle and report on the account, which is also divided into paragraphs, each of which refers to a specified paragraph of the written objections and states the finding with respect thereto and his recommendation concerning it, is sufficient: *Estate of McPhee*, 156 Cal. 335, 104 Pac. 455. (See page 1207.)

**(6) Purpose of Statute. Practice. Pleadings. Issues.** (See page 1207.)

**(7) Additional or amended exceptions.** (See page 1208.)

**(8) Untenable objections.** (See page 1208.)

**(9) Evidence. Burden of Proof. Presumptions.** (See page 1209.)

**(10) Waiver of written objections.** (See page 1210.)

## 9. POWER AND DUTY OF COURT.

**(1) In general.** Where an appeal from an order reducing an allowance to an administrator for attorney's fees, the record contained no testimony as to value of the services, the court's allowance for services, nearly all of which were performed in the course of administration in that court, will not be disturbed in the absence of a clear showing of abuse of discretion: *In re Dan's Estate*, 39 Mont. 433, 104 Pac. 522.

**(2) As to notice.** (See page 1211.)

**(3) To scrutinize accounts.** Though there be no objection or exception, the probate court should make careful examination of credits claimed by the representative and reject improper ones: *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448. (See page 1211.)

**(4) In absence of exceptions.** It was the duty of the court correctly to charge the administrator with the notes he ought to have paid, and to satisfy himself as to the correctness of the account, regardless of whether his attention was called to it in exceptions taken thereupon; and even if exceptions so taken were inadvertently disallowed, in connection with other exceptions to the account not approved, such



inadvertent ruling is not ground for a reversal of a properly corrected account of the administrator: *In re Loheide*, 17 Cal. App. 475, 120 Pac. 56. (See page 1212.)

#### REFERENCES.

Right of court on its own motion to surcharge executor or administrator, see note 18 L. R. A. (N. S.) 284-286.

(5) **Report of referee.** (See page 1212.)

(6) **To compel accounting.** Since the enactment, in 1905, of section 1639 of the Code of Civil Procedure, empowering the superior court, sitting in probate, to compel the personal representatives of a deceased executor or administrator to render an account of the administration of their testator or intestate, and to settle such account as in other cases, an action in equity will not lie to compel the executor or administrator of a deceased executor or administrator to settle the account of his testator or intestate with the estate in which the decedent has been acting: *King v. Chase*, 159 Cal. 420, 115 Pac. 207.

The jurisdiction granted by section 1639 of the Code of Civil Procedure, to the superior court in which the estate was being administered of which the decedent was executor or administrator, is a power which may, under section 5 of article VI of the constitution, be conferred upon the superior court as a "matter of probate": *King v. Chase*, 159 Cal. 420, 115 Pac. 407.

Prior to the enactment, in 1905, of section 1639 of the Code of Civil Procedure, the power of a court in equity to compel such an accounting was based solely on the lack of any statutory method of accomplishing the same end by a proceeding in probate. Now that this lack has been remedied, the foundation of the equity jurisdiction is gone: *King v. Chase*, 159 Cal. 420, 115 Pac. 407.

The fact that the superior court exercises both equitable and probate jurisdiction will not warrant the upholding of a judgment for an accounting, rendered against an executor of a deceased executor in an action in equity brought after



the enactment of said section 1639, where such executor, at the time he accounted in such action, objected to the jurisdiction of the court to compel him to account therein: *King v. Chase*, 159 Cal. 420, 115 Pac. 407. (See page 1212.)

(7) **Striking. Combining. Making more specific.** (See page 1213.)

(8) **Want of jurisdiction.** (See page 1214.)

#### 10. ADMINISTRATOR TO BE CHARGED WITH WHAT.

An administrator personally indebted to the estate on promissory notes, which he is able to pay, and who never credited the estate therewith on the insufficient ground that to pay the same would have sacrificed his private business, was properly charged with the amount thereof in his final account as money on hand for distribution. His primary duty was to the trust assumed, and he was not authorized to show favor to himself as a debtor to the estate greater than to any other debtor. He had no right to use the credit of the estate to promote his personal gain, or to maintain a business which might suffer if he drew out of his capital enough to pay what he owed the estate: *Estate of Loheide*, 17 Cal. App. 475, 120 Pac. 56.

Even if there are no creditors interested in the notes due from the administrator to the estate charged in his final account, the heirs are nevertheless entitled to have brought into the estate for distribution all that legally and rightfully belongs to the estate, including such notes, and if the administrator is then personally insolvent, though able to pay the same at any time during his administration, the heirs may look to the sureties on his official bond to enforce his delinquency: *In re Loheide*, 17 Cal. App. 475, 120 Pac. 56.

Administrator held chargeable with simple interest for use of money of estate though widow consented: *In re McPhee's Estate*, 156 Cal. 335, 104 Pac. 455.

Representative may be charged with compound interest on money converted by him as where he delayed settlement for



many years and converted funds: *In re McPhee's Estate*, 156 Cal. 335, 104 Pac. 455. (See page 1215.)

#### 11. ADMINISTRATOR NOT CHARGEABLE WHEN.

A request made by a testator of a third person to remove to his burial plot the remains of certain of his relatives and to erect a monument over his grave, is not binding upon his executors: *Estate of Hinchon*, 159 Cal. 755, 116 Pac. 47. (See page 1216.)

#### 12. ADMINISTRATOR IS ENTITLED TO CREDIT FOR WHAT.

(1) **In general.** (See page 1216.)

(2) **Payments made for preservation or protection of estate.** It is proper for an heir to take care of the property of decedent so far as necessary for its preservation, or cause it to be done, until an administrator was appointed, and if expense was incurred therein, the heir is entitled to compensation out of the estate: *In re Murray's Estate*, 56 Or. 132, 107 Pac. 21. (See page 1218.)

(3) **Same. Necessary expenditures.** An executor is entitled to charge the estate with his expenses necessarily incurred in conducting litigation to determine whether certain real property is liable for the payment of obligations of the estate: *Nelson v. Schoonover*, 89 Kan. 779, 132 Pac. 1183. (See page 1219.)

(4) **For costs paid.** (See page 1219.)

(5) **Funeral expenses. Last illness.** Where a will expresses the wish of the testatrix for burial in a particular place, but burial is had elsewhere by direction of husband, in accordance with what he states to have been her desire, expressed after the date of the will, the executor is thereby relieved of responsibility in the matter. His duty does not require him to challenge the accuracy of the husband's statement, or to make an issue therein for the determination of a court: *Nelson v. Schoonover*, 89 Kan. 779, 132 Pac. 1184.



Money paid for the funeral expenses of a decedent, by one not acting officiously, if reasonable, considering the estate of the deceased and the circumstances surrounding the death and burial, should be repaid by the estate to the party paying them: *Estate of Hinchon*, 159 Cal. 755, 116 Pac. 47. (See page 1220.)

(6) **Payment of family allowance.** (See page 1220.)

(7) **Traveling expenses.** (See page 1221.)

(8) **Items for less than twenty dollars.** (See page 1222.)

### 13. ADMINISTRATOR IS NOT ENTITLED TO CREDIT WHEN.

(1) **In general.** The costs of executors who are also heirs incurred in defending an action for accounting and partition brought against them by other heirs involving purely questions of heirship are not expenses of administration which can be charged against the estate: *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1107. (See page 1222.)

(2) **Improper charges.** The assignments made to plaintiff by executors from whom moneys had been illegally exacted upon the filing of inventories and appraisements were not invalid under section 1517 of the Code of Civil Procedure as sales made without order of the court. That section is inapplicable. It may be assumed that the assignments were made for collection, but it is also to be considered that the money paid was not part of the property of the estate, but was a payment unauthorized by law. It must be presumed that the probate court refused to give the executors credit for said payments in their accounts. The payments were chargeable to them individually, and they had the right to recover them in their individual capacities and the corresponding right to make assignments: *Trower v. City and County of San Francisco*, 157 Cal. 762, 109 Pac. 617. (See page 1223.)

(3) **Unnecessary expenditures.** Estates of decedents should not be subjected to unnecessary legal expenses and



an attempted sale of the real estate of minors to pay unnecessary fees is expressly disapproved: *Estate of Kamai-piialii*, 19 Haw. 163.

Where an executor improperly charged in his accounts the cost of an automobile he is entitled to be credited with the amount obtained on its sale when the original cost is disallowed in his accounts: *In re Witt's Estate*, 74 Wash. 172, 132 Pac. 1612. (See page 1224.)

(4) **Expenses before administration.** (See page 1224.)

(5) **Repairs. Protection of Estate.** (See page 1225.)

#### 14. FINAL AND INTERMEDIATE ACCOUNTS. WAIVER.

While, under Code Civ. Proc., Sec. 1622, an administrator's intermediate account must state all matters necessary to show condition of estate, court is required to scrutinize account only so far as receipts and disbursements of money are concerned, and hence intermediate decree need not charge representative with all the property as disclosed by inventory and appraisement: *In re Bottom's Estate*, 156 Cal. 129, 103 Pac. 849. (See page 1225.)

15. **FAILURE TO SETTLE.** (See page 1226.)

#### 16. DEATH OR ABSCONDING BEFORE ACCOUNTING.

An administrator with the will annexed died in office without having accounted for moneys which he had collected belonging to the testator's estate. His successor obtained judgment in the district court against his administrator for the sum found to be due. The judgment was presented, allowed, and classified in the probate court as a claim against the estate, but no order was issued upon his administrator for its payment and it was not paid. Held such an order is not a condition precedent to recovery against the sureties on his bond: *Toffler v. Kessinger*, 80 Kan. 549, 102 Pac. 1097. (See page 1227.)



**17. INSOLVENT ADMINISTRATORS. (See page 1228.)****18. TRIAL BY JURY. (See page 1229.)****19. VALIDITY OF SETTLEMENT.**

Conclusions and findings in a contested proceeding for settlement of an administrator's account are not necessary: In *re McPhee's Estate*, 156 Cal. 335, 104 Pac. 455. (See page 1229.)

**20. EFFECT OF SETTLEMENT.**

An administrator can not be garnisheed before final settlement of the estate or some order of distribution is made: *Clark v. Kraig*, 21 Colo. App. 196, 120 Pac. 1044.

The fact that on the same day as that of the settlement of the account of the administrator, the petition of an heir to require him to give further security was heard, and a contemporaneous order was made requiring further security to be given within ten days, in default of which his letters were to be revoked, does not imply that the orders are inseparable, or that the order requiring further security is dependent upon the order settling the account: *Estate of McPhee v. Corrigan*, 10 Cal. App. 162, 101 Pac. 530. (See page 1230.)

**21. CONCLUSIVENESS OF SETTLEMENT.**

(1) **In general.** When in the settlement of an annual account of an executor, investments upon notes and mortgages taken by him in his own name, without an order of court, were reported to the court and found to be for the benefit of the estate, and were assigned to the estate, so long as they were treated as the property of the estate, the settlements of annual accounts based thereon are conclusive against all persons interested in the estate not under disability: *Estate of Richmond*, 9 Cal. App. 402, 99 Pac. 554.

A decree duly entered on a final accounting by a county court, in the absence of mistake or fraud, and from which no appeal has been taken, is conclusive on the administrator



and the sureties on his bond: *Shipman v. Brown*, 36 Okla. 623, 130 Pac. 603.

Allowance and settlement of intermediate account, after due notice, conclusively establishes claim formerly allowed and presented therein as required by section 1628 of the Code of Civil Procedure, as against all persons interested, in absence of timely appeal or attack thereon under section 473: *Kowalsky v. Santa Cruz County Superior Court*, 13 Cal. App. 218, 109 Pac. 158.

A decree settling the final account of an administratrix and directing the payment of a settled claim against the estate, the time for appeal from which has elapsed, is conclusively binding upon the surety of the administratrix, in case of her final noncompliance therewith, and the surety can not collaterally attack the decree by showing that the claim was forever barred by reason of the fact that it had not been presented within the time limited by law and by the notice to creditors: *L. Harter Co. v. Geisel*, 18 Cal. App. 282, 122 Pac. 1094. (See page 1231.)

(2) **Items included. Items omitted.** (See page 1233.)

## 22. VACATING ACCOUNTS. COLLATERAL ATTACK. RELIEF IN EQUITY.

(1) **In general.** It was within the discretion of the court to set aside and vacate the order settling the final account of an administrator with the will annexed, upon the petition of absent heirs who are legatees; and in view of their objections stated in their letters and shown by the affidavit of their attorney, and of the files and records of the court, it is held that there was no abuse of discretion of the court in setting aside and vacating such order: *Estate of Miller v. Schlegel*, 15 Cal. App. 557, 115 Pac. 329.

Court held without power in 1910 to entertain motion to vacate allowance made in 1907: *Kowalsky v. Santa Cruz County Superior Court*, 13 Cal. App. 218, 109 Pac. 158. (See page 1234.)

(2) **Void decree only may be vacated.** (See page 1234.)



(3) **Can not be set aside for "mistake," etc., when.** (See page 1235.)

(4) **Collateral attack.** (See page 1235.)

(5) **Equitable relief. In general.** (See page 1235.)

(6) **Equitable relief for fraud or mistake.** (See page 1236.)

### 23. APPEAL.

(1) **In general.** (See page 1237.)

(2) **Appealable orders.** (See page 1238.)

(3) **Nonappealable orders.** An allowance of an attorney's fee, upon the settlement of the account of an executor, can not be reviewed on appeal, if no objection thereto was raised in the lower court: *Estate of Rohrer*, 160 Cal. 574, 117 Pac. 672. (See page 1238.)

(4) **Parties. Representative.** (See page 1238.)

(5) **Notice.** (See page 1239.)

(6) **Findings. Bill of exceptions. Record.** On an appeal from an order denying a motion for a new trial, in a proceeding by executors for the settlement of the accounts and for the distribution of the decedent's estate, there being no appeal taken from the decree made in such proceeding, the sufficiency of the findings to sustain the decree can not be reviewed: *Estate of Keating*, 162 Cal. 406, 122 Pac. 1079.

(7) **Sufficiency of judge's certificate.** (See page 1242.)

(8) **Consideration of case. Review.** (See page 1242.)

(9) **Affirmance. Remanding. Reversal. Dismissal. Remittitur.** Where serious question arises, either over the character or value of the service of the estate, the appellate court will be reluctant to disturb the determination of the judge in probate with respect to the allowances made the administrator, or an allowance made where extraordinary services are



found to have been rendered. Where, however, the court made a detailed finding of the nature and character of the services, and withheld extra compensation in the mistaken belief that, though they were of great value, and not such as the administrator was bound to render, they still did not come fairly within the category of extraordinary service, the appellate court will reverse the order refusing extra compensation, and direct the probate court to fix the amount thereof: *Estate of Broome*, 162 Cal. 258. 122 Pac. 470. (See page 1244.)



CHAPTER III.

PAYMENT OF DEBTS.

1. In general.
2. Order of payment can not be changed.
3. Preference.
4. Payment of claims prior to settlement.
5. Premature or unauthorized payments. Advancement.
6. Funeral expenses. Monuments, etc. Expenses of administration.
  - (1) Burial.
  - (2) Funeral expenses.
  - (3) Expenses of administration.
7. Property available for payment of debts.
  - (1) In general.
  - (2) Community property.
  - (3) Rents and profits.
  - (4) Property bequeathed or devised.
8. Marshaling of assets.
9. Decree or order for payment.
  - (1) In general.
  - (2) Application for order.
  - (3) Duty of court. Granting of order.
  - (4) Validity of order. Effect of.
10. Payment of interest bearing claims.
11. "Contingent" claims.
12. Deficiency. Part payment. Disputed claims.
13. "Dividends."
14. Mortgages and judgments.
15. Enforcement of payment.
16. Appeal.

1. IN GENERAL. (See page 1256.)

2. ORDER OF PAYMENT CAN NOT BE CHANGED.  
(See page 1257.)

3. PREFERENCE. (See page 1258.)

4. PAYMENT OF CLAIMS PRIOR TO SETTLEMENT.  
(See page 1258.)



**5. PREMATURE OR UNAUTHORIZED PAYMENTS.  
ADVANCEMENT. (See page 1259.)**

**REFERENCES.**

**Right of executor or administrator to recover back from creditor excessive payments made under the mistaken belief that the estate was solvent, see note 28 L. R. A. (N. S.) 440.**

**6. FUNERAL EXPENSES, MONUMENTS, ETC.  
EXPENSES OF ADMINISTRATION.**

**(1) Burial.** It was the duty of the executors, under the circumstances appearing, to initiate and prosecute appropriate proceedings providing for final and permanent disposition of the remains of their testator, and equally the duty of the court upon a proper showing, which we must presume to have been made, to make an order authorizing the executors to execute that duty. The wish of the deceased and his widow can not affect or interrupt the court's power of jurisdiction to make the order: *Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023. (See page 1260.)

**(2) Funeral expenses.** (See page 1260.)

**(3) Expenses of administration.** (See page 1261.)

**7. PROPERTY AVAILABLE FOR PAYMENT OF  
DEBTS. (See page 1262.)**

**(1) In general.** (See page 1262.)

**(2) Community property.** (See page 1263.)

**(3) Rents and profits.** (See page 1263.)

**(4) Property bequeathed or devised.** (See page 1263.)

**8. MARSHALING OF ASSETS. (See page 1264.)**

**9. DECREE OR ORDER FOR PAYMENT.  
(See page 1265.)**

**(1) In general.** (See page 1265.)



- (2) **Application for order.** (See page 1265.)
- (3) **Duty of court. Granting of order.** (See page 1266.)
- (4) **Validity of order. Effect of.** (See page 1266.)
- 10. **PAYMENT OF INTEREST BEARING CLAIMS.**  
(See page 1267.)
- 11. **“CONTINGENT” CLAIMS.** (See page 1267.)
- 12. **DEFICIENCY. PART PAYMENT. DISPUTED CLAIMS.** (See page 1267.)
- 13. **“DIVIDENDS.”** (See page 1268.)
- 14. **MORTGAGES AND JUDGMENTS.** (See page 1269.)
- 15. **ENFORCEMENT OF PAYMENT.** (See page 1270.)
- 16. **APPEAL.** (See page 1271.)







## PART XII.

### PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES. ABSENT INTERESTED PARTIES. ACCOUNTS OF TRUSTEES.

#### CHAPTER I.

##### PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

§ 712. Payment of legacies.

§ 715. Prayer of applicant granted. Legatee's bond. Executor to deliver heir's portion.

##### PARTIAL DISTRIBUTION.

1. Power of courts.
2. Petition.
3. Notice.
4. Bond.
5. Hearing.
6. Order or decree.
7. Other matters.
8. Appeal.

§ 712. **Payment of legacies.** At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, legatee (or his assignee, grantee or successor in interest) may present his petition to the court for the legacy or share of the estate to which he is entitled, or any portion thereof, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1915), § 1658.**

§ 715. **Prayer of applicant granted. Legatee's bond. Executor to deliver heirs' portion.** If, at the hearing, it appears that the estate is but little indebted, and that the



share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant requiring:

1. Each heir, legatee, devisee (or his assignee, grantee, or successor in interest) obtaining such order, before receiving his share or any portion thereof, to execute and deliver to the executor or administrator, a bond, in such sum as may be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled. Where the time for filing or presenting claims has expired, and all claims that have been allowed, have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond;

2. The executor or administrator to deliver to the heir, legatee, devisee (or his assignee, grantee or successor in interest), the whole portion of the estate to which he may be entitled, or only a part thereof designating it.

If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings must be paid by the applicant, or if there are more than one, must be apportioned equally among them.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1921), § 1661.**

1. **Power of courts.** The superior court in probate has no jurisdiction to entertain a proceeding for partial distribution on the petition of an administrator. A decree so rendered is void, as the statute authorizes the proceeding on the petition of an heir, devisee, or legatee only: *Alcorn v. Gieseke*, 158 Cal. 396, 111 Pac. 98.



A district court in a proceeding for partial distribution may not determine questions of heirship and upon such a proceeding the distribution can be made only to such persons whose rights as heirs have been established and also the amounts of the estate to which they are entitled: *In re Fleming's Estate*, 38 Mont. 57, 98 Pac. 649. (See page 1286.)

**2. Petition.** (See page 1287.)

**3. Notice.** (See page 1288.)

**4. Bond.** Upon a petition for partial distribution of an estate at the expiration of four months, it is erroneous to distribute all of the property of the estate, simply reserving bonds to secure debts. Enough property should be reserved not only to cover the entire debts and expenses of administration, but also to secure payment of the inheritance tax by the distribution under the Act of March 20, 1905: *Estate of Gird*, 157 Cal. 534, 108 Pac. 499, 137 Am. St. 131. (See page 1289.)

**5. Hearing.** (See page 1289.)

**6. Order or decree.** A decree of partial distribution as modified on appeal, is a conclusive adjudication as to the construction to be given to the will in question and the rights of the parties affected thereby must be measured solely by it: *Hardy v. Mayhew*, 158 Cal. 95, 110 Pac. 113.

Where the proper notice for a decree of partial distribution has been given, as required by section 1659 of the Code of Civil Procedure, and the court has thereunder rendered its decree, such decree will be conclusive of the rights of the legatees and devisees under the will, subject to appeal therefrom; hence such decree is not open to attack on the ground that the evidence upon which it was predicated was incompetent or insufficient. In order to justify any interference with the result flowing from the decree, it would be necessary to charge and prove in a proceeding having that purpose in view some fraud collateral or extrinsic to the matters or questions examined and determined in the proceeding cul-



minating in the decree: *French v. Phelps*, 20 Cal. App. 101, 128 Pac. 772, 777. (See page 1290.)

**7. Other matters.** A chose in action which the executors were endeavoring to recover should not be distributed on a partition for partial distribution in opposition to the wishes of certain of the parties in interest and the executors: *Estate of Colburn*, 164 Cal. 1, 127 Pac. 643.

Where the vendor of land contracted to be sold to a purchaser, deraigns title under a decree of partial distribution of the estate of her deceased husband, which, in effect, adjudged the sufficiency of her title under the will, and included therein the actual distribution of her title, acquired by purchase and assignment of the interests of all the other heirs and legatees under the will, the title so deraigned is complete, and the purchaser is not justified in rejecting it on the ground that the interest of minors and incompetent persons acquired through their guardians were not legally acquired. The title so decreed by a court of competent jurisdiction is not collaterally assailable: *French v. Phelps*, 20 Cal. App. 101, 128 Pac. 772.

On partial distribution on application of heirs, under Code Civ. Proc., Sec. 1658 et seq., before final settlement, court must retain sufficient assets to pay debts and past and prospective administration expenses, and can not distribute entire estate on theory that petitioner's bonds will protect creditors: *In re Gird's Estate*, 157 Cal. 534, 108 Pac. 499, 137 Am. St. 131.

If debt is amply secured by mortgage, however, it may be disregarded, land mortgaged remaining subject to mortgage after distribution under section 1661: *In re Gird's Estate*, 157 Cal. 534, 108 Pac. 499, 137 Am. St. 131.

Application to vacate order of partial distribution held within six months' limitation prescribed in Code Civ. Proc., Sec. 473, for relief from orders or judgments generally, such order not having been "taken" until formal signing and filing though previously orally announced and noted on



“rough minutes” of clerk: *Brownell v. Yolo County Superior Court*, 157 Cal. 703, 109 Pac. 91.

An agreement between all of the heirs of an estate providing for the distribution to one of them of a sum of money in excess of his share “upon the distribution of the estate,” may be enforced by him on a proceeding had for a partial distribution, if the estate has ample funds with which to pay such sum over and above all contingent or possible demands upon its moneys: *Estate of Broome*, 162 Cal. 258, 122 Pac. 470.

It is held that the appellant, having a vested right in real property described in remainder, is entitled to a partial distribution of his estate therein, and an order refusing the same must be reversed: *In re De Vries*, 17 Cal. App. 184, 119 Pac. 109. (See page 1291.)

**8. Appeal.** Where a decree of partial distribution was made according to the terms of a will, and was contested upon petition of the heirs on the alleged ground that the will was void as imposing a secret invalid trust for the heirs, who have appealed from such decree, it is held that the appellants have mistaken their remedy, which is not in the probate court, by opposition to the bequest under the will, but solely by an independent action in equity to enforce the trust, if it exists, and that the decree of partial distribution appealed from must be affirmed: *In re Sharp*, 17 Cal. App. 634, 120 Pac. 1079.

Where no trust or invalidity appears upon the face of the will, it must be given effect in the probate court according to its terms: *In re Sharp*, 17 Cal. App. 634, 120 Pac. 1079.

Where an independent suit in equity was resorted to and the decree of the court of equity adjudging the nonexistence of any secret or invalid trust which could be enforced in favor of the heirs has been affirmed upon appeal, such affirmation is *res adjudicata* as to the very matter it was sought to litigate in this proceeding, and it is manifest that a reversal of the decree in partition appealed from could be of no avail to the appellants: *In re Sharp*, 17 Cal. App. 634, 120 Pac. 1079.



Upon appeal from an order denying partial distribution of an estate in remainder on the alleged ground that the remainder is contingent the decision must rest on the intention of the testator, which must be gathered from the language of his will viewed in the light of established and accepted canons of construction: *Estate of De Vries*, 17 Cal. App. 184, 119 Pac. 109.

Where persons claiming to be heirs of a deceased person presented a petition for partial distribution to them as such, and an answer thereto was filed by the executor and by the devisee and legatee under the will, taking issue upon their alleged heirship, and a trial was had of such issue, and findings made thereupon against the claim of heirship, neither party will be allowed to object upon appeal for the first time, that no issue existed to be tried as to heirship, and that the matter must rest upon the terms of the will: *Estate of Campbell*, 12 Cal. App. 707, 108 Pac. 669, 676.

Where contest had arisen over a will, and the distributees thereunder entered into a written agreement providing for distribution of the estate, any one interested in the estate would have the right of appeal from an order of partial distribution in violation of the written agreement: *In re Colton's Estate*, 164 Cal. 1, 126 Pac. 643.

There can be no doubt of the right of an executor to appeal from any order which is embarrassing to the due administration of the estate: *In re Colton's Estate*, 164 Cal. 1, 127 Pac. 643.

Appeals from an order denying a petition for partial distribution suspend all power of the superior court to distribute the estate during their pendency: *Estate of Spreckels*, 165 Cal. 597, 133 Pac. 289.

There is no legal inconsistency in the assertion of rights to an estate on final distribution proceedings on the theory of the intestacy of the deceased, and the assertion at the same time of rights thereto under the will by the prosecution of an appeal from an order made upon partial distribution



proceedings denying the latter rights: *Estate of Spreckels*, 165 Cal. 597, 133 Pac. 289.

While the court, by reason of the pendency of an appeal from an order denying partial distribution, might not make a decree of final distribution until the appeal is disposed of, it is not without power to settle, upon initiative of all the parties on petition for final distribution and in advance and in anticipation of an ultimate decree therefor, any questions affecting the rights of the estate: *Estate of Spreckels*, 165 Cal. 597, 133 Pac. 289.

Where, pending an appeal from an order denying partial distribution of an estate to the trustees, under a will, as such, on the ground of the invalidity of the trust, they, in their individual capacities as devisees and legatees, make application for final distribution of the estate to themselves on the theory of the intestacy of the deceased and contest the rights of certain heirs to participate in such distribution by reason of alleged advancements, such action on their part does not constitute an election to claim as heirs, nor does it constitute a waiver of the prosecution of their appeal, which deprives the court of jurisdiction upon the reversal of the order to enter into the decree of partial distribution: *Estate of Spreckels*, 165 Cal. 597, 133 Pac. 289.

An appeal by the administrator with the will annexed from portions of a decree of partial distribution is in effect an appeal from a judgment and may be taken on the judgment-roll alone, consisting of the petitions of the parties, the oppositions thereto, the findings thereon, and the decree based upon those findings. No bill of exceptions or other certification as provided by law and by rule XXIX of the supreme court is necessary. The clerk's certificate to the correctness of the transcript is sufficient: *Estate of Broome*, 162 Cal. 258, 122 Pac. 470.

Upon appeal from an order denying partial distribution of an estate in remainder after the expiration of a life estate in the widow of the testator, on the alleged ground that the remainder is contingent, the decision of the question whether



the remainder is vested or contingent must rest on the intention of the testator, which must be gathered from an interpretation of the language of his last will and testament viewed in the light of established and accepted canons of construction: *In re De Vries*, 17 Cal. App. 184, 119 Pac. 109. (See page 1293.)



## CHAPTER II.

### PROCEEDINGS TO DETERMINE HEIRSHIP. DISTRIBUTION ON FINAL SETTLEMENT.

§ 738. Final distribution of estate.

§ 740. Distribution when decedent was not a resident of state.

### ESTABLISHMENT OF HEIRSHIP, RIGHTS AND LIABILITIES OF HEIRS, AND DISTRIBUTION.

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  - (3) To enforce trust.
  - (4) In partition.
  - (5) On promissory notes.
  - (6) To quiet title.
  - (7) Counterclaim will not be considered when.
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4. Actions by heirs against administrators.
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5. Limitation of actions by heirs. Laches.
6. Actions between heirs and devisees.
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8. Estoppel of heirs.
9. Liability of heirs.
  - (1) In general.
  - (2) Limitation of liability.
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11. Purchaser from heirs.
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  - (2) Purchaser does not acquire what.
12. Mortgages by heirs and devisees pending administration.
13. Contract relinquishing right as heir.
14. Right of heirs to contest accounts. Jurisdiction to determine conflicting interests.
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1. In general.
2. Petition for distribution.
3. Notice.
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5. Delay of distribution.
6. Jurisdiction.
7. Distribution with final accounting and settlement.
  - (1) In general.
  - (2) Waiver of settlement of account.
  - (3) Settlement of accounts. Notice.
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  - (1) In general.
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9. Consideration of will.
10. Objections to distribution.
11. Kinds of property.
12. Distributees.
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  - (2) Assignees. Shares "conveyed." Grantee.
  - (3) Retention of distributee's share for debt.
  - (4) Right of action to recover property.



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  - (1) In general.
  - (2) Appointment of agent for.
14. Decree.
  - (1) In general.
  - (2) Power of court.
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  - (4) Notice.
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  - (6) Error. Irregularity. Nullity.
  - (7) Effect of decree.
  - (8) Conclusiveness of decree as to persons.
  - (9) Conclusiveness of decree as to subject matter.
  - (10) Decree is not conclusive as to whom, and what.
  - (11) Enforcement of decree. Contempt. Execution.
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  - (13) Vacating decree. Fraud. Equity.
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  - (15) Loss of jurisdiction.
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15. Payment. Duty of executors.
16. Distribution without decree.
17. Rights of creditors. Set-off. Garnishment.
18. Actions by transferees of choses in action.
19. Appeal.
  - (1) In general.
  - (2) Stay of proceedings.
  - (3) Who can not appeal.
  - (4) Distribution pending appeal.
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  - (6) Reversal and its effect.
  - (7) Nonappealable orders.
  - (8) Dismissal.
  - (9) Failure to object to petition for distribution.

§ 738. **Final distribution of estate.** Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, devisee (or his assignee, grantee or successor in interest), the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, or the issue of a deceased child, and any of them, before the close of the administra-



tion, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed as provided in the Civil Code. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final account, must be reported and filed at the time of making such distribution; and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court, and included in the order or decree, or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1923), § 1665.**

**§ 740. Distribution when decedent was not a resident of the state.** Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, or if the decedent died intestate, and an administrator has been duly appointed and qualified in the state of his residence, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, or if the court is satisfied that it is for the best interests of the estate, that the estate in this state should be delivered to the executor or administrator in the state or place of the decedent's residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed or administrator, in this state, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents



by order of the court.—**Kerr's Cyc. Code Civ. Proc.** (**Kerr's Cum. Supp.**, p. 1925), § 1667.

## **1. PROCEEDINGS TO DETERMINE HEIRSHIP.**

### **1. JURISDICTION OF COURTS.**

- (1) In general.** (See page 1320.)
- (2) Limitations of jurisdiction.** (See page 1322.)

### **2. PROCEDURE.**

**(1) In general.** Where a petition is filed for distribution of the estate of an intestate to persons alleged to be the sole heirs of the deceased and thereafter without formally answering such petition and denying its allegations of heirship, other persons file similar petitions claiming to be the sole heirs, issues of fact on the question of heirship are thereby raised, the determination of which by the trial court is subject to be reviewed on motion for a new trial: *Carter v. Waste*, 159 Cal. 23, 112 Pac. 727.

Where one of the heirs of the decedent died without issue prior to the determination of the heirship, the other heirs can not acquire her interest in the estate of the decedent through the probate proceedings of the original estate: *In re Skelly's Estate* (S. Dak.), 143 N. W. —. (See page 1323.)

- (2) Parties. Pleadings.** (See page 1324.)

**(3) Trial.** Where a petition is filed for the distribution of the estate of an intestate to persons alleged to be the sole heirs of the deceased, and thereafter, without formally answering such petition and denying its allegations of heirship, other persons file similar petitions claiming to be the sole heirs, issues of fact on the question of heirship are thereby created, the determination of which by the trial court are subject to be reviewed on motion for a new trial: *Carter v. Waste*, 159 Cal. 23, 112 Pac. 727. (See page 1325.)



**(4) Decree.** In a proceeding instituted under section 1664 of the California Code of Civil Procedure to determine and declare the rights of all persons in the estate of a testator, in advance of distribution, the decree rendered therein is conclusive in the matter of the distribution of the estate and the fact that one of the interested parties dies pending such proceeding does not make her interest subject to administration where it is provided by the decree that her heirs are entitled to have such interest distributed to them: *Estate of Herman*, 47 Cal. Dec. 433, 140 Pac. —.

In a proceeding for the distribution of the estate of a deceased person, which involves the determination of the question of the survivorship of two persons who were killed in the same calamity, the fact of survivorship must be established by a preponderance of evidence, not because the heirs of one decedent or of another begin a contest, but because it is the duty of the court to determine the matter of heirship and survival: *Estate of Loucks*, 160 Cal. 551, 117 Pac. 673. (See page 1326.)

**(5) Costs.** (See page 1326.)

**(6) Appeal.** Where the proof of heirship was insufficient, but it appeared that on a retrial further evidence might be forthcoming and that further opportunity should be given claimants to submit proof of their relationship to deceased, the action was remanded to the district court for retrial on that issue, and the state to whom the property would escheat in default of heirs would be represented in the retrial: *In re Peterson's Estate*, 22 N. Dak. 503.

In this proceeding to determine the succession to the estate of a deceased person the decision of the trial court upon the conflicting evidence is conclusive; and even if it be conceded that the appellate court may weigh the evidence where all the testimony is given by deposition, the testimony herein is not of such a character as to justify a reversal of the decision upon the ground of abuse of discretion: *Estate of Walden (Monro v. Latimer)*, 166 Cal. 446, 137 Pac. 35. (See page 1326.)



### 3. EVIDENCE. DECLARATIONS OF FAMILY.

Declarations of members of the family of the deceased concerning family history and relationship, made after contest to succession of the estate, are inadmissible to prove heirship to the estate: *Estate of Walden* (*Monro v. Latimer*), 166 Cal. 446, 137 Pac. 35.

Such declarations are not admissible to prove pedigree or relationship, except when they are made by the members of the family as natural or spontaneous declarations on the subject, and before any dispute has arisen over the question or any claim has been made to the establishment of which the declarations would be material: *Estate of Walden* (*Monro v. Latimer*), 166 Cal. 446, 137 Pac. 35.

In a proceeding for the distribution of the estate of an intestate, the burden of proof is upon the persons claiming distribution to establish their relationship to the deceased: *Estate of Fleming*, 162 Cal. 524, 123 Pac. 284.

In a proceeding for the distribution of the estate of an intestate to persons claiming to be a half sister and the children of a deceased half brother of the deceased, the evidence is reviewed and, although conflicting, is held sufficient to sustain the findings of the trial court that neither of such claimants was in any way related to the deceased nor one of his heirs at law: *Estate of Fleming*, 162 Cal. 524, 123 Pac. 284.

### 4. DEGREES OF KINSHIP.

Under section 1386, subdivision 5, and section 1393 of the Civil Code, a cousin once removed of a deceased person does not stand in the same degree of kinship as the nephews and nieces of the deceased, and is not entitled with them to succeed to the estate: *Estate of Moore*, 162 Cal. 324, 122 Pac. 844.

The finding that the persons to whom the estate was distributed were the nieces of the deceased is held sustained by the evidence: *Estate of Moore*, 162 Cal. 324, 122 Pac. 844.



## II. RIGHTS AND LIABILITIES OF HEIRS.

### 1. APPOINTMENT OF ATTORNEY FOR HEIRS.

(See page 1327.)

### 2. VESTING OF PROPERTY IN HEIRS. BURDENS.

(1) **In general.** Under the Code of North Dakota the heirs or devisees have no right to a decedent's property until his debts are paid. The creditors are the first preferred parties in interest and until satisfied, heirs or legatees have no enforceable interest: *Dow v. Lillie* (N. Dak.), 144 N. W. 1085.

The heir or legatee has no right to the personal property of the estate until the close of the administration, except as derived through the executor or administrator: *Murphy v. Tillson*, 64 Or. 558, 130 Pac. 637.

Failure to mention real property in a petition for letters of administration does not defeat or even cloud the title of an heir under Rem. & Bal. Code of Washington, Sec. 1366, which vests the real property of a deceased person immediately in the heirs subject only to an administration: *Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 193. (See page 1327.)

(2) **Judgment liens against heirs.** (See page 1329.)

(3) **Community property.** (See page 1329.)

### 3. ACTIONS BY HEIRS.

(1) **In general.** (See page 1329.)

(2) **In ejectment.** (See page 1331.)

(3) **To enforce trust.** (See page 1332.)

(4) **In partition.** (See page 1332.)

(5) **On promissory notes.** (See page 1333.)

(6) **To quiet title.** (See page 1333.)



**(7) Counterclaim will not be considered when.** (See page 1333.)

#### REFERENCES.

Right to partition among remaindermen pending life estate, see note 28 L. R. A. (N. S.) 125.

**(8) Judgment for heirs as an estoppel.** Though judgment estops only as to parties and privies, all the world are parties to regular probate proceedings wherein claim of representative is allowed, and are thus bound, subject to right of interested parties, to have claim set aside for cause: *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. (See page 1333.)

#### 4. ACTIONS OF HEIRS AGAINST ADMINISTRATORS.

**(1) In general.** In an action against an administratrix by an heir to compel defendant to turn over to plaintiff one-half in value of certain notes claimed to belong to the estate, the mortgages securing the notes on which were written assignments of the mortgages to testator's widow, the administratrix, were admissible to identify the notes as the notes which were transferred by decedent: *Lane v. Lane*, — Colo. —, 140 Pac. 806. (See page 1333.)

#### 5. LIMITATION OF ACTIONS BY HEIRS. LACHES. (See page 1335.)

#### 6. ACTIONS BETWEEN HEIRS AND DEVISEES. (See page 1337.)

#### 7. RIGHT OF HEIRS TO ATTACK SALE OF PROPERTY. (See page 1337.)

**(1) For want of jurisdiction.** (See page 1337.)

**(2) For fraud.** (See page 1338.)

#### 8. ESTOPPEL OF HEIRS. (See page 1339.)



9. LIABILITY OF HEIRS. (See page 1339.)

(1) In general. (See page 1339.)

(2) Limitation of liability. (See page 1340.)

10. NO ALLOWANCE TO HEIRS OF COSTS AND EXPENSES FROM ESTATE. (See page 1341.)

11. PURCHASER FROM HEIRS. (See page 1342.)

(1) In general. (See page 1342.)

(2) Purchaser does not acquire what. (See page 1343.)

12. MORTGAGES BY HEIRS AND DEVISEES, PENDING ADMINISTRATION. (See page 1343.)

13. CONTRACT RELINQUISHING RIGHT AS HEIR.  
(See page 1344.)

14. RIGHT OF HEIRS TO CONTEST ACCOUNTS. JURISDICTION TO DETERMINE. CONFLICTING INTERESTS. (See page 1345.)

Where, during the lifetime of their father, children entered into an agreement between themselves to ignore their father's will in the event he made one, and then share his estate equally as if he had died intestate, such an agreement is not in the nature of an attempted assignment of an expectant interest, and the determination of the rights of the parties under the contract are not within the jurisdiction of the probate court which settled up the estate, but the remedy to one of the children was an action for breach of the contract: *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379. (See page 1344.)

15. NOT PREJUDICED BY PROBATING OF WILL.

A testator devised and bequeathed his entire estate to his wife and minor son but omitted to mention his children by his first wife. On the application for probate the children



of the first wife appeared and the court admitted the will to probate. An appeal was taken by the children of the first wife to the district court which affirmed the order of the county court admitting the will to probate subject to the rights of each and all of the children of the first wife in and to the estate as might thereafter be established by the county court. An appeal was then taken from that judgment on the hearing of which the supreme court held that the probating of the will was not final as to its validity and construction which might be discussed and adjudicated at any time before the final distribution and affirmed the judgment of the district court: *Lowery v. Hawker*, 22 N. Dak. 319. (See page 1344.)

### III. DISTRIBUTION.

#### 1. IN GENERAL. (See page 1345.)

#### 2. PETITION FOR DISTRIBUTION. (See page 1346.)

#### 3. NOTICE.

The statute governing the decree of distribution in probate proceedings (Rem. & Bal. Code, Sec. 1589) by reference to the statute governing the sale of real estate by an executor or administrator provides that the decree only after notice of hearing has been "personally served on all persons interested in the estate at least ten days before the time appointed for the hearing of the petition or shall be published at least four successive weeks in such newspaper as the court shall order." (Rem. & Bal. Code, Secs. 1499, 1500.) In this case though the notice was published four times, less than four weeks elapsed between the first and the fourth publication and the notice was insufficient to give the court jurisdiction to make the order of sale: *In re Hascheid's Estate*, — Wash. —, 139 Pac. 63. (See page 1347.)



#### 4. LIMITATIONS ON DISTRIBUTION.

(1) **In general.** (See page 1348.)

(2) **Payment of taxes. Collateral inheritance tax.** Where decree of distribution fixed residue in hands of representative at certain sum, "less amount of inheritance tax as required by law," but did not fix amount of tax, and distributees were not within inheritance tax law, they were entitled to whole residue without deduction of any tax: *Wirringer v. Morgan*, 12 Cal. App. 26, 106 Pac. 425.

The administrator with the will annexed, who succeeded the executor making a misappropriation, is expressly authorized and obligated by the Inheritance Tax Act, to deduct the tax on the value of the residuary estate misappropriated from the other property in its hands constituting part of the residuum of the estate and belonging under the provisions of the will to the residuary legatee: *Estate of Hite*, 159 Cal. 392, 113 Pac. 1072. (See page 1348.)

#### 5. DELAY OF DISTRIBUTION.

Where an estate consists almost wholly of an indivisible chose in action, actually in litigation, the very existence of the property as assets being uncertain and contingent upon the determination of the suits, it is improper to allow distribution of such estate pending litigation, even when the estate is but little indebted. (See Code Civ. Proc., Sec. 1661): *In re Colton's Estate*, 164 Cal. 1, 127 Pac. 643. (See page 1349.)

#### 6. JURISDICTION.

A decree of the superior court of this state distributing the estate of a deceased person is in itself presumptive evidence of the jurisdiction of the court to render it, and by itself affords evidence of the transmission of the title of the deceased: *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263.

In the state of California the same presumption exists in favor of the acts of the superior court done in the exercise of its probate jurisdiction, as exists in favor of its acts done



in ordinary litigation between parties: *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263. (See page 1349.)

## 7. DISTRIBUTION WITH FINAL ACCOUNTING AND SETTLEMENT.

(1) **In general.** (See page 1350.)

(2) **Waiver of settlement of account.** (See page 1351.)

(3) **Settlement of accounts. Notice.** (See page 1352.)

(4) **Distribution subsequent to final settlement. Power of court.** A decree of final distribution can be had only after settlement of the final account: *Estate of Spreckels* (Cal. Sup.), 133 Pac. 289.

It is held in this case that a minute entry was not intended as a decree of distribution: *Estate of Spreckels*, 165 Cal. 597, 133 Pac. 289. (See page 1352.)

## 8. WHAT MATTERS MAY BE ADJUSTED.

(1) **In general.** In the state of California the rules governing the subject of advancement are embraced in sections 1395-1399, 1309 and 1351 of the Civil Code. No special form, not even the signature of the decedent, is required to constitute a charge of the advancement in writing, as prescribed by section 1397. It is sufficient if it appears that the writing was done by the decedent and shows the intent to charge the money or property given as an advancement rather than a gift or loan: *Estate of Hayne*, 165 Cal. 568, — Pac. —.

Though property which is distributed to the successor in interest of a devisee is subject to any valid lien of mortgage created thereon by the devisee, the decree of distribution should not attempt to determine the rights between the mortgagee and distributee: *Estate of Lynn*, 163 Cal. 803, 127 Pac. 75.

The superior court, in proceedings for final settlement and distribution in probate, has power to determine, as between



heirs, legatees and devisees, the payment of debts, expenses and interest on mortgaged property and the application of rents and profits of real estate: *Estate of DeBernal*, 165 Cal. 223, 131 Pac. 375.

Where conflicting claims are made to the distributive share of an estate, it is not an imperative duty of the court, in proceedings for distribution, to decide the rights of the parties; it may make the decree of distribution so as to leave the parties free to have their dispute decided in a court of equity in a proper action: *Estate of Gamble*, 166 Cal. 253, 135 Pac. 970. (See page 1353.)

(2) **Question of heirship.** Whatever may be the rule in other jurisdictions, the rule is settled in the state of California that evidence of the declarations of a deceased brother of an intestate sister, as to the relationship between them are admissible in favor of his daughter as petitioner for distribution of the estate of the deceased sister, without requiring any independent proof as to the relationship between the deceased brother and sister: *Estate of Clark*, 13 Cal. App. 786, 110 Pac. 828. (See page 1354.)

#### 9. CONSIDERATION OF WILL. (See page 1355.)

#### 10. OBJECTIONS TO DISTRIBUTION.

The submission of a proceeding for the distribution of the estate of a deceased person, in pursuance of a stipulation and an agreed statement of facts which set out the claim of the appellants to a distributive share of the estate operated as a waiver of the necessity, if any existed, for the appellants to file formal written objections to the petition for distribution: *Estate of Davidson*, 21 Cal. App. 118, 131 Pac. 67.

Persons having no interest in an estate have no standing to question the manner of its distribution: *Estate of Spreckels*, 165 Cal. 223, 133 Pac. 289.

In this state, while there is an attorney of record representing a party, the court is not bound to observe or follow the directions of the party himself as to the disposal of the



case, made in his absence and without the consent of his attorney: *Estate of Cowell*, 47 Cal. Dec. 247, 139 Pac. 84.

On a proceeding for the distribution of the estate of a decedent, the court is not bound to comply with a written statement filed by a person entitled to distribution, purporting to withdraw his petition therefor, if he was represented in such proceeding by an attorney of record and the statement was neither signed nor agreed to by such attorney: *Estate of Cowell*, 47 Cal. Dec. 247, 139 Pac. 84.

#### REFERENCES.

As to right of attorney to control cause, see note in 93 Am. St. 169.

Under the law of this state, as it now stands, a motion for a new trial of any issue of fact actually made and determined in any proceeding in probate will lie when the law expressly authorizes issues of fact to be framed in such proceeding, and the provisions authorizing written objections on the part of persons interested in the estate and providing for the hearing and determination of those objections do expressly authorize issues of fact to be framed: *Carter v. Waste*, 159 Cal. 23, 112 Pac. 727.

Section 1668 of the Code of Civil Procedure, as amended in 1907, expressly authorize the framing of issues of fact in a proceeding for final distribution of the estate of a deceased person, by the filing of written objections to the petition for distribution, and a motion for a new trial in such proceeding is authorized: *Carter v. Waste*, 159 Cal. 23, 112 Pac. 727.

It is the duty of any person who desires to dispute the final settlement of an administrator's account to appear in the court and file or make his objections and a failure to do so constitutes laches and prevents a plea that the proceedings were taken against him through excusable neglect: *Chandler v. Probate Court*, — Ida. —, 141 Pac. 638. (See page 1357.)

#### 11. KINDS OF PROPERTY.

It may be said, not, of course, as a proposition of law, but as a statement of fact for the guidance of courts in probate,



that, generally speaking, claims in litigation should not be distributed unless with the full assent of all the parties interested, and under circumstances where it is apparent to the court that no embarrassment will result to the administrators, or to the administration, in the orderly effort to reduce such a claim to judgment and possession: *In re Colton's Estate*, 164 Cal. 1, 127 Pac. 643.

Future testamentary interests, as to time of enjoyment, are distributed by decree, same as property as to which there is immediate right of possession: *Hardy v. Mayhew*, 158 Cal. 95, 110 Pac. 113, 139 Am. St. 73. (See page 1358.)

## 12. DISTRIBUTEES.

(1) **In general.** (See page 1359.)

(2) **Assignees. Shares "conveyed." Grantee.** Assignment by a legatee under a will of certain money "which may be coming to me as an heir at law of the said . . . deceased, under the terms of his will" will be construed as intended to transfer portions of the interest of the assignor as a "beneficiary under the will": *Estate of Rankin*, 164 Cal. 138, 127 Pac. 1034.

The provisions of section 1678 of California Code of Civil Procedure, authorizing the court upon the distribution of the estate to distribute the share of heirs, legatees, or devisees to those who have received conveyances thereof, applies only where no question arises on distribution as to such conveyances having been made. When the fact of conveyance is in dispute, or where its validity or effect is an issue upon the distribution, the determination of that question is not a matter within the probate jurisdiction of the superior court: *Estate of Howe*, 161 Cal. 152, 118 Pac. 515.

Although the probate court has jurisdiction to consider and determine the right of distribution of a person claiming as an assignee of an heir, devisee or legatee under a conveyance made subsequent to the death of the decedent, it has not jurisdiction to adjudicate the claim to distribution of the assignee or grantee of an heir apparent under a conveyance



made prior to the death of the decedent: *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379.

A decree of distribution giving the property to the bona fide purchaser "subject, however, to any rights" of a person claiming under a deed absolute in form but in fact simply a mortgage, is erroneous, since if the rights under the mortgage really existed, the decree would, as a matter of law, be subject to it: *Estate of Lyon*, 163 Cal. 803, 127 Pac. 75.

Where a widow was at the same time both a beneficiary under, and an executrix of, a will, and had purchased the interests of the other legatees and devisees thereunder, but there is no evidence that the consideration for such purchase was inadequate, nor that any of the beneficiaries so disposing of their interests were dissatisfied with their bargain, a decree of distribution confirming title to the property in such widow will be conclusive of the rights therein declared: *French v. Phelps*, 20 Cal. App. 101, 128 Pac. 772, 777.

Where the interest of an heir in an estate is assigned to another and the estate is subsequently settled by decree of distribution, the interest so acquired by assignment is merged in the decree of distribution, and the title of such assignee is referable to and he holds under the decree and not under the assignment: *Hopkins v. White*, 20 Cal. App. 234, 128 Pac. 780, 782.

The provisions of section 1678 of the Code of Civil Procedure, authorizing the court, upon the distribution of the estate of a deceased person, to distribute the shares of heirs, legatees, or devisees to those who have received conveyances thereof, only applies where no question arises on distribution as to such conveyances having been made. When the fact of conveyance is in dispute, or where its validity or effect is an issue upon the distribution, the determination of that question is not a matter within the probate jurisdiction of the superior court: *Estate of Howe*, 161 Cal. 152, 118 Pac. 515.

Upon a proceeding for the distribution of the estate of a deceased person, where one claiming as an execution purchaser,  
Probate Sup. 24.



chaser of the interest of an heir asks distribution to himself, and the heir raises an issue as to the validity and legal effect of such sale, and sets up a prior assignment of his interest to a third person, it is proper for the court in probate to refuse to determine such conflicting claims and to decree distribution to the heir, subject to the rights, if any, of the adverse claimants: *Estate of Howe*, 161 Cal. 152, 118 Pac. 515. (See page 1361.)

**(3) Retention of distributee's share for debt.** (See page 1362.)

**(4) Right of action to recover property.** (See page 1363.)

### 13. DISTRIBUTION TO NONRESIDENTS.

**(1) In general.** Under section 1691, Code of Civil Procedure, the power of the former probate court, or of the present superior court to appoint agents for nonresident distributees, to take possession of their distributive shares, neither was nor is limited to orders therefor made prior to the decree of distribution. That action authorizes the appointment of such agent after such decree, upon a showing of the necessity therefor: *Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100.

The purchase price of land in the state of California which a testatrix domiciled in another state had contracted to sell in her lifetime, and which was collected by her administrator with the will annexed in the state of California, is personal property, the distribution of which is governed by the law of the domicile of the testatrix: *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242.

It is not the duty of the court, under section 1666 of the Code of Civil Procedure, in making the decree of distribution, to enter into any investigation as to whether a distributee is or is not a resident of the state, or if a nonresident, whether he has or has not an agent here. Whether he is a resident or not only becomes of real importance after the distribution is made, and is then only important in so far



as it may affect the closing of the administration of the estate: *Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100. (See page 1363.)

**(2) Appointment of agent for.** Under section 1691 of the Code of Civil Procedure, the power of the former probate court, or of the present superior court, to appoint agents for nonresident distributees, to take possession of their distributive shares, neither was nor is limited to orders therefor made prior to the decree of distribution. That section authorizes the appointment of such agent after such decree, upon a showing of the necessity therefor: *Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100.

The necessity for the appointment of an agent for a nonresident distributee proceeds from the fact that the executor or administrator can not have the estate closed and obtain a final discharge and release of his sureties until the entire estate is turned over to the distributees and their receipts therefor presented to the court. It is to accomplish this purpose that the "necessity" for the appointment of an agent arises, and could generally only arise after distribution, and upon the failure of such distributee to receive and receipt for his share: *Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100.

The validity of an order appointing an agent for a nonresident distributee is not affected by the fact that the same person was by such order appointed as agent for an assignee of such distributee. If the court had no jurisdiction to appoint an agent for the assignee, the order would still be valid as an appointment of an agent for the distributee: *Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100.

In order to warrant the appointment of an agent it must appear to the court that a particular distributee is a nonresident having no agent in this state. This showing is jurisdictional, but these facts appearing, it is not necessary to the validity of the order that it designate the agent as appointed for the distributee by name. The agent appointed holds the property distributed for any one who subsequent to the order of appointment may show that he is entitled to it, whether



it be the distributee or some third person claiming under him: *Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100.

The court having jurisdiction of the matter of the estate in which the order was made appointing the agent for a non-resident distributee, had jurisdiction of a proceeding instituted in such matter by an assignee of such distributee to compel the agent to account for the property of which he took possession. A final judgment rendered in such accounting is binding on the agent and is equally binding and conclusive upon his sureties: *Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100.

#### 14. DECREE.

(1) **In general.** The rule that all presumptions must be indulged which are favorable to the regularity of the proceedings leading to the rendition of a judgment and in support thereof is to be applied with no less rigor to a decree of distribution than to any other kind of judgment, and it is therefore to be presumed that the evidence upon which the decree was predicated was in all respects sufficient and competent, and that any legal objections that could have been made against it were made by the party objecting to the granting of the petition, and were decided by the court at the hearing: *French v. Phelps*, 20 Cal. App. 101, 128 Pac. 772, 776. (See page 1364.)

(2) **Power of court.** (See page 1365.)

(3) **Not to escheat.** (See page 1366.)

(4) **Notice.** (See page 1367.)

(5) **Annulling will after distribution.** (See page 1367.)

(6) **Error. Irregularity. Nullity.** Where on a petition for the settlement of a final account of an administrator the court undertook to make a decree of final distribution it was held that the distributee took nothing under such decree and could not transfer any title to a purchaser: *Carter v. Frahm*, 31 S. Dak. 399.



A formal administration was not void or ineffective, because of the fact that the record therein shows that the court declared that the property as to which administration was had was the community property of the decedent and her surviving husband, and distributed it all accordingly. This does not make the proceedings or decree void. At the most it was a mere error and mistake injurious to the person who would have inherited the property from the deceased, if it had been her separate estate, and which they could correct only by moving for a new trial or by taking an appeal from such decree. In the absence of such proceedings for a review of that decree it became final and conclusive upon all heirs, legatees, and devisees. (See Code Civ. Proc., Sec. 1668.): *O'Brien v. Nelson*, 164 Cal. 573, 129 Pac. 985.

The omission of a devise over is inconsequential if the will itself is made part of the decree. Rule applied where decree by reference embodied in itself entire will: *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287. (See page 1368.)

(7) **Effect of decree.** One who obtains title to a note and mortgage through a decree of distribution is entitled to sue therein: *West v. Mears*, 17 Cal. App. 718, 121 Pac. 700.

While a will was void under the statute of the state of Washington as to children not named or provided for, a decree of distribution assigning the whole property to the husband of the testatrix became final and conclusive after the time for appeal had expired, the court having jurisdiction and there being no suggestion of fraud: *In re Ostlund's Estate*, 57 Wash. 350, 106 Pac. 1117. (See page 1369.)

(8) **Conclusiveness of decree as to persons.** Under section 1666 of the Code of Civil Procedure a decree of distribution is conclusive as to the rights of heirs, legatees, or devisees, but it is conclusive against them only as heirs, legatees, or devisees, that is only so far as they claim in such capacities. Its determination of such matters does not create any new title; it merely declares the title which accrued under the law of descents or under the provisions of the will: *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981.



Where pretermitted heirs having invoked the jurisdiction of the United States court for the Indian Territory, sitting in probate, against certain orders made in the probate proceedings in which they were interested, and having obtained an order of distribution, though not the character of relief sought, but being such as the court, under sections 6500 and 6501, Mansfield Dig. (Secs. 3572, 3573, Ind. Ter. Ann. Stats. 1899), had, upon proper showing, authority to make, and it not appearing that any exceptions thereto were saved and it further not appearing what was done with regard to complying with the order of distributions, held that such heirs were barred by the decree of distribution: *Steele v. Kelley*, 32 Okla. 547, 122 Pac. 935.

While a decree of distribution does not create the title in the distributees it is a solemn adjudication of who acquired the title of the deceased, and, if rendered upon due process of law, is final and conclusive upon that question: *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1118.

A decree under section 1666 of the Code of Civil Procedure "is conclusive as to the rights of heirs, legatees or devisees, but it is conclusive against them as heirs, legatees or devisees, only so far as they claim in such capacities." A decree distributing an estate to the heirs is therefore not conclusive against one claiming as grantee from such heirs by an instrument executed after the death of the ancestor, and before the decree. Nor does it bind third parties who claim an interest adverse to that of the testator or intestate: *Archer v. Harvey*, 164 Cal. 274, 128 Pac. 410, 412.

An unassailed decree of distribution to the widow of a testator of all of his real property in fee is conclusive against the existence of any trust in favor of a son of the testator under the will: *Wills v. Wills*, 166 Cal. 446, 137 Pac. 249.

The will can not be resorted to in such a case to show that the property was distributed in trust, as it is only where by apt language the will is incorporated into the decree that this may be done: *Wills v. Wills*, 166 Cal. 446, 137 Pac. 249.



In a proceeding under section 1664 of the Code of Civil Procedure to determine and declare the rights of all persons in the estate of a testator, in advance of distribution, the decree rendered therein is conclusive in the matter of the distribution of the estate and the fact that one of the interested parties dies pending such proceeding does not make her interest subject to administration, where it is provided by the decree that her heirs are entitled to have such interest distributed to them: *Estate of Horman*, 167 Cal. 473, 140 Pac. 11. (See page 1370.)

**(9) Conclusiveness of decree as to subject matter.** A decree of distribution is the final determination of the rights of the parties to a proceeding and upon its entry their rights are thereafter to be exercised by the terms of the decree. It constitutes not only the law of the personalty, but also of the real estate. A decree of distribution has, in most respects, all the efficacy of a judgment at law or decree in equity. When a decree of distribution has been made the probate court has no longer jurisdiction of the property distributed, and the distributee thenceforth has an action to recover his estate, or, in proper cases, its value: *Sjoli v. Hogenson*, 19 N. Dak. 92.

A decree of distribution, after due and legal notice, by a court having jurisdiction of the subject matter is conclusive as to the fund items, and matters covered by and properly included therein, until set aside or modified by the court or until reversed on appeal: *In re Evans*, 22 Utah 366, 130 Pac. 234. (See page 1371.)

**(10) Decree is not conclusive as to whom and what.** A decree of distribution of the estate of a deceased person which has been administered on as in intestate's estate, although it has become final, is not a bar to the subsequent admission to probate of the will of the deceased. The admission of such will to probate is not an attack, direct or collateral, upon the decree of distribution, and is authorized to establish the status of that instrument as a will, in order that the devisees and legatees claiming under it may be in a position to assert their rights in equity against the distribu-



tees as involuntary trustees of the rightful owners of the property of the estate: *Estate of Walker*, 160 Cal. 547, 117 Pac. 510.

A finding in the decree of distribution of the grantor's estate that the purchaser under execution of the interest of one of the heirs has not yet acquired the legal title to such interest and is not entitled to have it distributed to him, is not an adjudication that he has acquired no right that may not ripen into a legal title, the period of redemption from the execution sale not having yet expired, and the probate court having no authority to distribute to an execution purchaser: *Sherran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454.

Where a statutory notice of an application for a decree of distribution provided that if any of the persons interested are minors they must have a guardian appointed to receive notice and appear for them, a minor who has no general guardian and for whom no guardian ad litem had been appointed and who claimed as heir was not bound by the decree and sale, even though his interest as such heir did not appear of record: *Horton v. Barto*, 57 Wash. 477, 107 Pac. 193.

Where a person agreed with an attorney to give him by way of compensation for his services a one-half interest in certain water rights upon the settlement of the question to be litigated, and pending litigation the client died, a decree of distribution distributing the estate of such client to the heirs is not conclusive against such attorney, and he may specifically enforce his agreements for the transfer of the water rights upon a showing that he has performed his part of the contract: *Archer v. Harvey*, 164 Cal. 274, 128 Pac. 410, 412.

While a decree of distribution, duly made, is conclusive upon those who may thereafter claim the property as heirs of the person whose estate is thereby distributed, it is not conclusive as to the facts on which such heirship depends when they arise collaterally in another action: *Estate of Walden* (*Monro v. Latimer*), 166 Cal. 446, 137 Pac. 35.



It is held that the question whether the decree rendered under section 1723 of the Code of Civil Procedure was conclusive upon such heirs as appeared before the court and submitted themselves to its jurisdiction, was not argued or decided, and that this court will not modify the decree in that respect upon petition for rehearing, but that there is nothing in the opinion that can be taken as foreclosing this question in future proceedings in the cause: *King v. Pauly*, 159 Cal. 549, 115 Pac. 210. (See page 1372.)

(11) **Enforcement of decree, contempt, execution.** (See page 1373.)

(12) **Collateral attack.** Where an heir assigned her interest in the estate, and by subsequent decree of distribution the assignee was declared entitled to all rights under the assignment, the assignment is not open to attack in a subsequent action on the ground that it is a fraud on creditors. To allow such attack would be to allow a collateral attack on the decree, which must be deemed conclusive as to the rights conferred: *Hopkins v. White*, 20 Cal. App. 234, 128 Pac. 780, 782.

The provision of section 1666 of that code, that "such order or decree (of distribution) is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside or modified on appeal," is only intended to make such decree final and conclusive as against collateral attack, and not as expressly excluding any remedy except direct appeal from the order or decree: *Carter v. Waste*, 159 Cal. 23, 112 Pac. 727.

When the decree of distribution determines matters, although the determination may be incorrect, it is conclusive as to the rights of heirs, legatees and devisees unless corrected on appeal. It is not subject to collateral attack or to be impeached by resort to the terms of the will, and the rights of the parties must thereafter be determined by a resort to the decree of distribution alone as a final and conclusive adjudication of the testamentary disposition: *Luscomb v. Fintzeiberg*, 162 Cal. 433, 123 Pac. 247.



(13) **Vacating decree. Fraud. Equity.** (See page 1374.)

(14) **Vacating premature decree.** (See page 1375.)

(15) **Loss of jurisdiction.** (See page 1376.)

(16) **Presumption as to law of sister state.** The law of a sister state, governing the distribution of estates of decedents, is presumed to be the same as the law of California: *Wills v. Wills*, 166 Cal. 529, 137 Pac. 249. (See page 1374.)

**15. PAYMENT. DUTY OF EXECUTORS.**  
(See page 1376.)

**16. DISTRIBUTION WITHOUT DECREE.**

Where land is devised by will to trustees, with a valid power to sell and apply the proceeds to certain valid trusts, the legal title vests in them, and they have power to convey that title subject to administration, without obtaining a prior order of the court in probate authorizing the conveyance. The fact that the deed from the trustees erroneously recites that it was made in pursuance of an order of court would not prevent the legal title from passing to the grantee, subject to administration: *Blair v. Hazzard*, 158 Cal. 721, 112 Pac. 298.

A contract between six out of seven heirs apparent during the lifetime of their father, reciting a consideration of love and affection, was to the effect that if he should devise or bequeath to any of said parties more or less than one-seventh of the total amount of his property, whatever they received from his estate upon partial or final distribution should be pooled, and divided equally among them. Under the father's will the plaintiff had received upon partial distribution of his estate a one-twentieth part thereof, whilst the executor, who was a residuary legatee of over one-fourth of the estate, has refused for considerably over one year to distribute the same, purposely to evade responsibility to plaintiff and other heirs similarly situated. Held that though the contract is susceptible of the narrow construction that its enforcement depends upon a distribution, yet it will not be so construed, as



against the plaintiff, under the facts of the case: *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379. (See page 1377.)

#### 17. RIGHTS OF CREDITORS. SET-OFF. GARNISHMENT.

A judgment recovered by an administrator against a legatee may be set off, upon distribution, against an assignee of the legatee's distributive share: *Estate of Gamble*, 166 Cal. 253, 135 Pac. 970. (See page 1378.)

#### 18. ACTIONS BY TRANSFEREES OF CHOSSES IN ACTION. (See page 1379.)

#### 19. APPEAL.

(1) **In general.** On appeal from a decree of distribution it was held that the record furnished no means of ascertaining whether the computation of the amount of the net proceeds of a certain lot applicable to the legacy in question was correct or not: *Estate of Gamble*, 166 Cal. 253, 135 Pac. 970.

Notice of appeal served after sixty days from entry of decree of final distribution held too late, section 1715, Code of Civil Procedure, not being affected by Act March 20, 1907, relating to appeals in general and applying to probate proceedings where not inconsistent with statute relating thereto: *In re Brewer's Estate*, 156 Cal. 89, 103 Pac. 486.

Devisee claiming in opposition to petitioner for distribution as heir is entitled to bill of exceptions where decree is in favor of petitioner, though he did not appear at hearing of petition: *In re Benner's Estate*, 155 Cal. 153, 99 Pac. 715.

Usually record on appeal from decree of distribution is sufficient without bill of exceptions, but, when determination depends wholly or in part on facts established by evidence, appellant may embody in bill so much as is pertinent: *In re Benner's Estate*, 155 Cal. 153, 99 Pac. 715.



The fact that the findings made in a proceeding for distribution do not support the judgment does not render the judgment void, but only erroneous, a condition warranting a reversal on an appeal therefrom by an aggrieved party. Such a point can not be considered on an appeal from an order denying a motion for a new trial, but only on direct appeal from the judgment: *Estate of Fleming*, 162 Cal. 524, 123 Pac. 284. (See page 1380.)

**(2) Stay of proceedings.** (See page 1381.)

**(3) Who can not appeal.** Disinterested claimant, on an appeal from an order denying her a new trial of the proceeding for distribution, and after the appellate court has approved the finding that she was in no way related to the deceased and had absolutely no interest in his estate, is not an aggrieved party as to findings made on any other issue, or as to the disposition of the estate made by the decree, and can not question their correctness: *Estate of Fleming*, 162 Cal. 524, 123 Pac. 284. (See page 1381.)

**(4) Distribution pending appeal.** (See page 1381.)

**(5) Review. Certiorari. Writ of Review.** (See page 1382.)

**(6) Reversal and its effect.** Where an order of the superior court denying partial distribution of the estate in accordance with the terms of the will on the ground that the trusts created thereby were invalid, is reversed on appeal, the judgment of the appellate court becomes conclusive as to the parties to the proceedings for partial distribution, and is *res adjudicata* as to who were entitled to take the estate on distribution, and subsequent decrees of partial and final distribution in conformity with the judgment of the supreme court are correctly made: *Estate of Spreckels*, 165 Cal. 597, 123 Pac. 371.

**(7) Nonappealable orders.** (See page 1383.)

**(8) Dismissal.** On an appeal from an order distributing an estate, the evidence is reviewed and held sufficient to



support the finding that the distributee was a niece and an heir of the testator: Estate of Hartman, 157 Cal. 206, 107 Pac. 105. (See page 1383.)

**(9) Failure to object to petition for distribution.** If the right to succeed to the property of a deceased is submitted for decision upon an agreed statement of facts, the respondents can not contend on appeal that the appellant should not be heard because he filed no formal objections to the petition for distribution to the respondents: Estate of Davidson, 21 Cal. App. 118, 131 Pac. 67.



## CHAPTER III.

## DISTRIBUTION AND PARTITION.

## § 754. Partition or distribution after conveyance.

## PARTITION IN CONNECTION WITH DISTRIBUTION.

1. Partition is authorized only in what cases.
2. Limited power of court.
3. Petition and proceedings preliminary to decree.
4. Requirement as to notice.
5. Limit as to whose interests may be recognized.
6. Same. Who entitled to distribution.
7. Essentials of decree and conclusiveness of.
8. Power of court after decree. Notice.

**§ 754. Partition or distribution after conveyance.** Partition or distribution of the estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1926), § 1678.**

1. **Partition is authorized only in what cases.** In the state of Washington it is not essential to a valid partition of property of an estate between the persons entitled thereto that an order of the probate court be had for that purpose. If the heirs are adults and the claims of creditors are satisfied a valid partition can be made by agreement: *Thatcher v. Copeca*, — Wash. —, 134 Pac. 925.

Where a wife occupies as a home the homestead set apart by order of the probate court from the estate of her deceased husband for the use of herself as a home, the same is not liable to partition at the suit of the heirs of the deceased husband: *Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220. (See page 1402.)



2. **Limited power of court.** (See page 1402.)
3. **Petition and proceedings preliminary to decree.** (See page 1403.)
4. **Requirement as to notice.** (See page 1403.)
5. **Limit as to whose interests may be recognized.** (See page 1404.)
6. **Same. Who entitled to distribution.** (See page 1404.)
7. **Essentials of decree and conclusiveness of.** (See page 1404.)
8. **Power of court after decree. Notice.** (See page 1405.)



## CHAPTER IV.

## DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

1. Representative is entitled to when.
2. Prerequisites to discharge.
3. Jurisdiction of court until discharge.
4. What amounts to discharge.
5. Validity of order.
6. Unauthorized procedure on distribution.
7. Effect of discharge. Conclusiveness.
8. Power of court to set aside.
9. After discovered property.

1. Representative is entitled to when. (See page 1423.)
2. Prerequisites to discharge. (See page 1423.)
3. Jurisdiction of court until discharge. (See page 1424.)
4. What amounts to discharge. (See page 1424.)
5. Validity of order. (See page 1425.)
6. Unauthorized procedure on distribution. (See page 1425.)
7. Effect of discharge. Conclusiveness. (See page 1425.)
8. Power of court to set aside. (See page 1426.)
9. After discovered property. After final settlement of the estate of an intestate the court is not bound to issue further letters unless there still remains property of the estate not finally disposed of. This rule is implied by Section 1698, California Code of Civil Procedure: *O'Brien v. Nelson*, 164 Cal. 573, 129 Pac. 985.



## CHAPTER V.

### ACCOUNTS OF TRUSTEES. DISTRIBUTION.

§ 799. Superior court not to lose jurisdiction by final distribution.

### TRUSTS UNDER WILLS, TESTAMENTARY TRUSTEES, AND DISTRIBUTION TO TRUSTEES.

1. Trusts under wills.
  - (1) In general.
  - (2) Creation of trusts.
  - (3) Construction of trusts.
  - (4) Judgment construing trust.
  - (5) Law of situs governs.
  - (6) Validity of trust.
  - (7) Void trusts.
2. Probate jurisdiction of trusts.
  - (1) To determine whether valid trust has been created.
  - (2) Retention of, for purpose of settling accounts.
  - (3) Exclusiveness of jurisdiction.
  - (4) To determine what questions.
  - (5) Over trustees, to prevent mismanagement.
3. Executor and testamentary trustee.
  - (1) Object of law.
  - (2) Testamentary trustees. In general.
  - (3) Executors who are trustees under will. Distinct and separate capacities.
  - (4) Duty, power, and liability of testamentary trustee.
  - (5) Duties of trustee can not be assumed until when.
  - (6) Duty of testamentary trustee before distribution.
  - (7) Discharge of executor acting as trustee.
  - (8) Trust with power to sell under will.
  - (9) Testamentary guardians.
4. Jurisdiction in equity.
5. Jurisdiction. Sale by trustees.
6. Discretionary trusts.
7. Devises in trust.
8. Purposes of trust communicated orally.
9. Accounting.
  - (1) Distinction between accounts.
  - (2) Duty and liability to account.
  - (3) Involves what determination. Power of court.
  - (4) Calling trustees to account.
  - (5) Compensation of trustee.

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**10. Distribution to trustees.**

(1) Power of court.

(2) Effect and validity of decree.

(3) On death, trust devolves on whom.

**11. Discharge of trustees.**

**§ 799. Superior court not to lose jurisdiction by final distribution.** Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts. And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time, pending the execution of his trust, or may, at the termination thereof, render and pray for the settlement of his accounts as such trustee, before the superior court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or, in case of his death, his legal representatives, shall, for that purpose, present to the court his verified petition, setting forth his accounts in detail, with a report showing condition of trust estate, together with a verified statement of said trustee, giving the names and postoffice addresses, if known, of the cestui que trust, and upon the filing thereof, the clerk shall fix a day for the hearing, and give notice thereof of not less than ten days, by causing notices to be posted in at least three public places in the county, setting forth the name of the trust estate, the trustee, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper. Such trustee may, in the discretion of the court, upon application of any beneficiary of the trust, or the guardian of such beneficiary, be ordered to appear and render his account, after being cited by service of citation, as provided for the service of summons in civil cases, and such application shall not be denied where no account has been rendered to the court within six months prior to such application. Upon the filing of the account so ordered, the same proceedings for the hearing and settle-



ment thereof shall be had as hereinabove provided.—Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1928), § 1699.

## I. TRUSTS UNDER WILLS.

(1) **In general.** A trust, created under a will, in personal property for the benefit of the testator's wife during her life, and directing the trustee after her death, to pay over the residue to two grandchildren named, is not invalid as suspending the power of alienation, under sections 769 and 1344 of the Civil Code. Those sections apply only to trusts in real property; and a trust in personal property is subject to no statutory restriction. The grandchildren named have a vested remainder in the residue of the personal property after the death of the wife: *Estate of Gregory*, 12 Cal. App. 309, 107 Pac. 566. (See page 1434.)

(2) **Creation of trusts.** An executor is a prima facie trustee for the next of kin, but is not necessarily a trustee for the testator's estate; though a devise to an executor, coupled with a power to sell real property for any specified purpose without an order of court creates a trust: *Thorson v. Hooper*, 57 Or. 75, 109 Pac. 389. (See page 1435.)

(3) **Construction of trusts.** (See page 1436.)

(4) **Judgment construing trust.** Where by the terms of a trust created under a will, the trustees were not authorized to make a lease to extend beyond the expiration of their trust, a lease executed by them for a fixed term with the privilege of renewal, which extended beyond the expiration of such trust, becomes upon its termination void as to the residue of the term of the lease, and can not be enforced thereafter by the lessee against the person entitled to the estate: *South End Warehouse Co. v. Lavery*, 12 Cal. App. 449, 107 Pac. 1008. (See page 1437.)

(5) **Law of situs governs.** (See page 1437.)

(6) **Validity of trust.** A trust created by will, which can by no possibility suspend the power of alienation beyond the duration of lives in being at the death of the testator, is



not unlawful under section 715 of the Civil Code: *Estate of Heberle*, 156 Cal. 723, 102 Pac. 935. (See page 1437.)

(7) **Void trusts.** (See page 1438.)

## 2. PROBATE JURISDICTION OF TRUSTS.

(1) **To determine whether valid trust has been created.** It is the duty of the court in probate, upon proceedings for the distribution of a testator's estate, to determine whether or not a valid trust had been created by the will, and to determine and declare in the decree the scope and terms of such trust as it found valid; to select the trustees and to make distribution to them of the trust property, and also to determine what other persons had legal or equitable rights to the distributable property of the estate, and the extent and nature of their interests: *Luscomb v. Fintzelberg*, 162 Cal. 433, 123 Pac. 247. (See page 1439.)

(2) **Retention of, for purpose of settling accounts.** (See page 1439.)

(3) **Exclusiveness of jurisdiction.** (See page 1440.)

(4) **To determine what questions.**

(5) **Over trustees, to prevent mismanagement.** (See page 1441.)

## 3. EXECUTOR AND TESTAMENTARY TRUSTEE. (See page 1441.)

(1) **Object of law.** (See page 1441.)

(2) **Testamentary trustees. In general.** (See page 1442.)

(3) **Executors who are trustees under will. Distinct and separate capacities.** (See page 1442.)

(4) **Duty, power, and liability of testamentary trustee.** (See page 1444.)

(5) **Duties of trustee can not be assumed until when.** (See page 1444.)



(6) **Duty of testamentary trustee before distribution.** (See page 1445.)

(7) **Discharge of executor acting as trustee.** (See page 1445.)

(8) **Trust with power to sell under will.** (See page 1446.)

(9) **Testamentary guardians.** (See page 1446.)

#### 4. JURISDICTION IN EQUITY.

A court of equity has no jurisdiction to construe a will where no trust is involved and the claims of the parties are of strictly legal interests in land: *Parks v. Boynaems*, 21 Haw. 196. (See page 1447.)

#### 5. JURISDICTION. SALE BY TRUSTEES.

(See page 1448.)

#### 6. DISCRETIONARY TRUSTS. (See page 1448.)

#### 7. DEVISES IN TRUST. (See page 1449.)

#### 8. PURPOSES OF TRUST COMMUNICATED ORALLY.

(See page 1449.)

#### 9. ACCOUNTING.

(1) **Distinction between accounts.** (See page 1450.)

(2) **Duty and liability to account.** (See page 1450.)

(3) **Involves what determination. Power of court.** (See page 1450.)

(4) **Calling trustees to account.** (See page 1451.)

(5) **Compensation of trustee.** (See page 1451.)



**10. DISTRIBUTION TO TRUSTEES. (See page 1452.)**

- (1) Power of court. (See page 1452.)**
- (2) Effect and validity of decree. (See page 1453.)**
- (3) On death, trust devolves on whom. (See page 1453.)**

**11. DISCHARGE OF TRUSTEES. (See page 1454.)**



## **PART XIII.**

### **ORDERS, DECREES, PROCESS, RECORDS, RULES OF PRACTICE, TRIALS, PROCEEDINGS TO TERMINATE LIFE ESTATES OR HOMESTEADS, OR COMMUNITY PROPERTY ON OWNER'S DEATH IN CERTAIN CASES NEW TRIALS AND APPEALS.**

#### **CHAPTER I.**

##### **ORDERS, DECREES, PROCESS, ETC.**

- § 825. New trials and appeals.**
- § 826. Appeal when taken.**
- § 835. Disposition of life estates and homesteads.**
- § 835a. Death before patent is issued.**

##### **PROBATE PRACTICE AND PROCEDURE.**

###### **1. Orders and decrees.**

- (1) Form of, signing, filing, etc.
- (2) To contain description when.
- (3) Correction of errors.
- (4) Signing of minutes.
- (5) Misleading entries. Clerk's register. Effect of.
- (6) Presumptions.
- (7) Entry of, in records.
- (8) Effect of. Protection of administrator.
- (9) Are void when.
- (10) Vacating orders.
- (11) Collateral attack.
- (12) Obedience to, how enforced.

###### **2. Publications.**

###### **3. Citations.**

- (1) Compared with summons.
- (2) Service of.
- (3) Same. By publication.



- (4) Personal notice.
- (5) Obedience to, how enforced.
- (6) Trial after response.
- 4. Notice, how waived.
- 5. Description once published is sufficient.
- 6. Rules of practice.
- 7. Trial in general.
- 8. Jury trial.
- 9. Attorney for absent heirs.
- 10. Costs.
  - (1) In general.
  - (2) Are statutory.
  - (3) Discretion of court.
  - (4) Do not include attorneys' fees.
  - (5) No amendment of judgment to include.
  - (6) Contesting probate of will.
  - (7) Action against co-executor.
  - (8) Presumption on appeal.
- 11. Disposition of life estates, etc.

**§ 825. New trials and appeals.** The provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; provided that hereafter a motion for a new trial in probate proceedings can be made only in case of contest of wills, either before or after probate and in proceedings under Sec. 1664 of this code.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1930), § 1714.**

**§ 826. Appeal, when taken.** The appeal may be taken at any time after the order, decree, or judgment is made or rendered, but not later than sixty days after the same is entered in the minute book of the court as provided in Sec. 1704.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1931), § 1715.**

**§ 835. Disposition of life estates and homesteads.** If any person has died or shall hereafter die who at the time of his death was the owner of a life estate which terminates by reason of the death of such person, or if such person at the time of his death was one of the spouses owning lands as a homestead, which lands by reason of the death of such per-



son, vest in the surviving spouse; any person interested in the property, or in the title thereto, in which such estates or interests were held, may file in the superior court of the county in which the property is situated, his verified petition setting forth such facts, and thereupon and after such notice by publication or otherwise, as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if upon such hearing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, or such homestead vested in the survivor of such marriage, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1932), § 1723.**

**§ 835a. Death before patent is issued.** In any case where a person has entered, or shall have entered, any lands in the United States and has died, or shall die, before patent for the same was issued, or shall have been issued, and patent thereafter was, or shall have been issued to the heirs of such decedent, any person interested in such lands as heir at law, or the successor in interest of such heir at law or the administrator, or executor, or heir at law of any of them if deceased, may file a petition in the superior court of the state of California in and for the county wherein said land or any part thereof is situate, setting forth the date of the death of such deceased entryman, the date and the issuance of such patent, and that the same was issued to the heirs at law of such deceased entryman, and the land described therein and the names, ages, and residences, if known, of the heirs at law of such deceased entryman (or if any such heirs are dead, or their residence is unknown, such facts shall be stated), and a request that a decree be entered in said court establishing who are or were the heirs at law of such deceased person.

Notice of the time and place for the hearing of said petition must be given by the clerk by posting notices thereof



in three or more public places in said county at least ten days prior to the date fixed for said hearing.

At any time before the date fixed for such hearing any person interested in said lands may answer said petition and deny any of the matters contained therein.

At the time fixed for such hearing or at such time thereafter as may be fixed by the court, the court must hear the proofs offered by the petitioner and the person answering the same, if there be any answer thereto, and must make a decree conformable to the proofs. Such decree shall have the same force and effect as decrees entered in accordance with the provisions of part III, title XI of this code.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1933), § 1724.**

### 1. ORDERS AND DECREES.

- (1) **Form of, signing, filing, etc.** (See page 1477.)
- (2) **To contain description when.** (See page 1478.)
- (3) **Correction of errors.** (See page 1478.)
- (4) **Signing of minutes.** (See page 1479.)
- (5) **Misleading entries. Clerk's register. Effect of.** (See page 1479.)
- (6) **Presumptions.** Where a section of a probate court provides that orders and decrees need not recite the existence of jurisdictional facts, it does not mean that such jurisdictional facts need not exist or that they should not be shown by the judgment roll, but it does mean that such orders and decrees are valid without the recital of jurisdictional facts. When such an order or decree is entered without such recitals, the jurisdictional facts will be presumed as against a collateral attack, which presumption can be overcome only by the judgment roll itself: **Carter v. Frahm, 31 S. Dak. 398.**

The orders and decrees of a probate court are not required to recite the existence of facts or the performance of acts



upon which the jurisdiction of the court depends; and the failure to recite such facts does not raise a presumption of their nonexistence: *Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220.

After jurisdiction acquired by proper notice, superior court though sitting in probate is court of general jurisdiction in acting on administrator's petition for sale of land, and entitled to same presumptions that attach to its action in other cases on collateral attack: *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067. (See page 1479.)

**(7) Entry of, in records.** (See page 1480.)

**(8) Effect of. Protection of administrator.** (See page 1481.)

**(9) Are void when.** A county court sitting in probate in Colorado is without jurisdiction over real estate in Nebraska and its order for sale of such land is not voidable, but void, and gave an administrator no jurisdiction in his representative capacity to sell the land, and every one is bound to take notice thereof: *People v. Parker*, 54 Colo. 604, 132 Pac. 57. (See page 1481.)

**(10) Vacating orders.** An order for the sale of real estate to pay debts is properly vacated, before confirmation of the sale, when it appears that it was made before the time for filing claims had expired, with no showing that the personalty had proved insufficient, upon insufficient jurisdictional allegations and with no notice to the heirs: *Estate of Kamaipiialii*, 19 Haw. 163. (See page 1482.)

**(11) Collateral attack.** A decree of distribution of a probate court is of like force and effect as a judgment in a civil case and can not be set aside on collateral attack. If erroneous the remedy is by appeal: *Alaska etc. Co. v. Noyes*, 64 Wash. 672, 117 Pac. 493. (See page 1482.)

**(12) Obedience to, how enforced.** (See page 1483.)



## 2. PUBLICATIONS.

Under section 1491a of the Code of Civil Procedure, within thirty days after the first publication of notice to creditors of a deceased person, the executor or administrator must file in court a printed copy of said notice, accompanied by a statement setting forth the date of the first publication thereof and the name of the newspaper in which the same is printed: *Hawkins v. Superior Court*, 165 Cal. 743, 134 Pac. 327. (See page 1484.)

## 3. CITATIONS. (See page 1485.)

- (1) Compared with summons. (See page 1485.)
- (2) Service of. (See page 1485.)
- (3) Same. By publication. (See page 1486.)
- (4) Personal notice. (See page 1487.)
- (5) Obedience to, how enforced. (See page 1487.)
- (6) Trial after response. (See page 1487.)

## 4. NOTICE, HOW WAIVED. (See page 1488.)

## 5. DESCRIPTION ONCE PUBLISHED IS SUFFICIENT. (See page 1488.)

## 6. RULES OF PRACTICE. (See page 1488.)

## 7. TRIAL IN GENERAL. (See page 1489.)

## 8. JURY TRIAL. (See page 1490.)

## 9. ATTORNEY FOR ABSENT HEIRS. (See page 1491.)

## 10. COSTS. (See page 1493.)

- (1) In general. (See page 1493.)
- (2) Are statutory. (See page 1493.)



- (3) **Discretion of court.** (See page 1493.)
- (4) **Do not include attorneys' fees.** (See page 1493.)
- (5) **No amendment of judgment to include.** (See page 1493.)
- (6) **Contesting probate of will.** (See page 1494.)
- (7) **Action against co-executor.** (See page 1494.)
- (8) **Presumption on appeal.** (See page 1494.)

## 11. DISPOSITION OF LIFE ESTATES, ETC.

When a complaint made under section 1723 of the Code of Civil Procedure states a case in equity to quiet title to alleged community property held in the wife's name, if all necessary parties had appeared before the court, the decree therein would be conclusive; but where there was no personal representative of the deceased wife before the court, and not all of the heirs were before the court, this court is bound to consider the decree relied on solely as one given in the special proceeding provided by that section and to give to it, in the event that proceedings had were all in strict accord with the requirements of that section, only such effect as upon a proper construction of the section must be given to a decree under its provisions: *King v. Pauly*, 159 Cal. 529, 115 Pac. 210. (See page 1495.)







# **PART XIV.**

## **PUBLIC ADMINISTRATOR.**

### **CHAPTER I.**

#### **PUBLIC ADMINISTRATORS.**

##### **§ 843a. Burial expenses of deceased persons.**

#### **PUBLIC ADMINISTRATORS.**

- 1. Character of office.**
- 2. Right to letters.**
  - (1) In general.**
  - (2) Competency.**
  - (3) Preference.**
  - (4) Discretion of court.**
  - (5) In case of foreign will.**
  - (6) Conflict of jurisdiction.**
  - (7) Issuance of letters.**
- 3. Oath and bond.**
- 4. Powers, duties, and liabilities.**
  - (1) In general.**
  - (2) Duty as to state moneys, escheat, etc.**
  - (3) Can not contest probate of will.**
  - (4) May contest another's right to administer.**
  - (5) Right to writ of prohibition.**
  - (6) "Return" of condition of estate.**
  - (7) Personal liability on contracts.**
- 5. Compensation.**
- 6. Appeal.**

**§ 843a. Burial expenses of deceased persons.** Whenever a public administrator takes possession of the estate of a deceased person, as provided in Sec. 1726 of this code, and the method of the defrayal of the expense of the burial of said deceased is not otherwise provided for by law, or by the rules, agreement or death benefits of any order or lodge to which the deceased may at the time of his death belong,



or with which he may have been affiliated, the public administrator may, in order to defray the proper expenses of the burial of the body of the deceased, apply to a judge of the superior court of the county in which said public administrator is acting, for an order permitting the public administrator to summarily sell any personal property belonging to the deceased, and to withdraw any money that the deceased may have on deposit with any bank, and to collect any indebtedness or claim that may be owing to or due the deceased. If upon such application it appears to the court by competent evidence, that the total value of the estate of the deceased is less than seventy-five dollars, the judge shall make an order granting the application and there shall be no administration upon the estate of the deceased unless additional estate be found or discovered. No notice of the application need be given and no fee shall be charged by the clerk of the court or the public administrator or his attorney for the filing of said application, or for any duty or service of the clerk or public administrator or his attorney connected therewith. Upon the sale of the personal property of the deceased, or the collection of any money, claim or indebtedness by the public administrator under said order the public administrator shall use the same for the expenses of the burial of the deceased. The public administrator shall file with the clerk of the court a statement showing the property of the deceased that came into his hands, the amount received from the sale of any personal property, and the disposition of the property of the deceased, and shall file with the clerk vouchers showing what disposition was made of the said property or the proceeds thereof.—**Kerr's Cyc. Code Civ. Proc. (Kerr's Cum. Supp., p. 1934), § 1726a.**

1. CHARACTER OF OFFICE. (See page 1504.)

2. RIGHT TO LETTERS.

(1) In general. (See page 1505.)

(2) Competency. (See page 1505.)



(3) **Preference.** Public administrator is entitled to preference over Italian consul general: *In re Ghio's Estate*, 157 Cal. 552, 108 Pac. 516.

Where a citizen of Italy resident in state dies intestate leaving property in said state, and all his heirs reside in Italy, consul general of Italy is not entitled to letters in preference to public administrator of county of decedent's residence, entitled by state laws to officiate in such cases, though Italian treaty with United States gives consul general all rights of same officers of most favored nation, and though United States treaty with Argentine Republic provides that consul general of either country "intervene in possession, administration, etc.," of intestate estates of citizens of such country dying in other, "conformable with laws of country" for benefit of creditors and heirs: *In re Ghio's Estate*, 157 Cal. 552, 108 Pac. 516, 137 Am. St. 145. (See page 1506.)

(4) **Discretion of court.** (See page 1506.)

(5) **In case of foreign will.** (See page 1507.)

(6) **Conflict of jurisdiction.** (See page 1507.)

(7) **Issuance of letters.** (See page 1508.)

### 3. OATH AND BOND.

Under the Kansas statute providing that, before a public administrator shall take charge of an estate, he shall make application to the probate court showing certain facts and shall give bond, and that the court shall thereupon issue him letters of administration, his appointment as administrator is not absolutely void by the omission of the application to set out some jurisdictional fact, where such fact actually exists: *Cox v. Kansas City*, 86 Kan. 298, 120 Pac. 553. (See page 1508.)

### 4. POWERS, DUTIES, AND LIABILITIES.

(See page 1508.)

(1) **In general.** (See page 1508.)

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(2) **Duty as to state moneys, escheat, etc.** (See page 1509.)

(3) **Can not contest probate of will.** (See page 1510.)

(4) **May contest another's right to administer.** (See page 1510.)

(5) **Right to writ of prohibition.** (See page 1510.)

(6) **"Return" of condition of estate.** (See page 1510.)

(7) **Personal liability on contracts.** (See page 1511.)

5. **COMPENSATION.** (See page 1511.)

6. **APPEAL.** (See page 1512.)



# **PART XV.**

## **WILLS.**

### **CHAPTER I.**

#### **EXECUTION OF WILLS. REVOCATION. CLASSES.**

##### **I. Execution of Wills. Classes.**

- 1. Right of testamentary disposition.**
- 2. Limitation of the right.**
  - (1) In general.**
  - (2) Special limitations by statute.**
  - (3) Limitation upon right as to certain persons.**
  - (4) Right of wife to support as limiting testator's control.**
- 3. Testamentary capacity.**
  - (1) In general.**
  - (2) As affected by age and physical infirmity.**
  - (3) As affected by fraud, undue influence, etc.**
- 4. Formalities and execution.**
  - (1) In general.**
  - (2) Signature of testator.**
  - (3) Publication by testator.**
  - (4) Subscribing witnesses.**
  - (5) Attestation by witnesses.**
- 5. Instruments informally executed invalid as wills.**
- 6. Codicils to will.**
  - (1) In general.**
  - (2) Reference to the will.**
- 7. Incorporating other papers by reference.**
- 8. Wills in form of deeds.**
  - (1) In general.**
  - (2) Particular examples.**
- 9. Contract to make a will.**
- 10. Escrow deed, when not a will.**
- 11. Deed construed in aid of will.**
- 12. Holographic wills.**
  - (1) In general.**
  - (2) Formalities in executing.**
  - (3) Holographic will by married woman.**



13. Nuncupative wills.
14. Mutual or reciprocal wills.
15. Foreign wills.
16. Nonintervention wills.
17. Instruments construed not to be wills.
18. Will as evidence.

## II. Revocation of Wills.

1. Revocation in general.
2. Facts and evidence relating to.
3. Revocation of trust devise.
4. Revocation by subsequent will or codicil.
5. Revocation by marriage, etc.

### I. EXECUTION OF WILLS. CLASSES.

#### 1. RIGHT OF TESTAMENTARY DISPOSITION.

The right to dispose of property by will is purely statutory: *In re Price's Estate*, 14 Cal. App. 462, 112 Pac. 482.

The right to make testamentary disposition of property depends entirely upon the will of the legislature. It may withhold the right altogether, or impose any limitations or conditions upon it which it chooses, and it follows therefore that the legislature also has the exclusive power to designate those whom the testator may make the objects of his bounty: *In re Beck's Estate*, 44 Mont. 561, 121 Pac. 786.

The plenary power of disposition of the owner as he may see fit, of course, includes the right to make an unnatural or unreasonable distribution: *Singer v. Taylor*, 90 Kan. 285, 133 Pac. 842.

One may dispose of his property to strangers and exclude heirs: *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960.

There is no duty on the part of a testator to will his property to relatives rather than to a stranger: *In re Burnham's Will*, 24 Colo. App. 131, 134 Pac. 257.

The right to make a testamentary disposition of property is not an inherent right; nor is it a right guaranteed by the fundamental law. Its exercise to any extent depends entirely upon the consent of the legislature, as expressed in the



statute enacted on the subject. It can withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases. It may declare the rules which must be observed, touching the execution and authentication of the instruments, and make a compliance with them mandatory: *In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1015.

The right to make a will includes the right to make it according to the testator's own desires, subject only to the statutory restrictions. It is no condition of this right that the will shall please a jury or a court, or the testator's relatives or any one else. The giving of unequal portions to the natural objects of the testator's bounty raises no presumption of undue influence. The fact may be considered in determining the question: Is this the testator's will? But in the absence of proof of undue influence it has no weight: *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 635.

The right to make a testamentary disposition of property is neither a natural nor a constitutional right, but is derived from and rests in positive law: *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1028. (See page 1535.)

#### REFERENCES.

As to testator's power in general, see note to *Wright v. Masters*, 135 Am. St. 794.

## 2. LIMITATION OF THE RIGHT.

(1) **In general.** (See page 1536.)

(2) **Special limitations by statute.** In determining whether gifts to charity exceed one-third of "estate of testator" leaving heirs, in violation of section 1313 of the Civil Code, court should consider all the property of testator wherever situated, whether within or without its jurisdiction: *In re Dwyer's Estate*, 159 Cal. 680, 115 Pac. 242.

There is no limitation on right to make charitable bequests, except as prescribed by said statute: *In re Dwyer's Estate*, 159 Cal. 680, 115 Pac. 242.



Since only one-third of assets after payment of debts and charges can go to charity, trustees entitled to proceeds of sale of land for charity were entitled to only such proceeds after deducting costs and expenses of sale: *In re Dwyer's Estate*, 159 Cal. 680, 115 Pac. 242.

Section 1469 of the Code of Civil Procedure providing for the setting aside of an estate not exceeding \$1500 in value, for the use and support of the family of the deceased, is a limitation on and controls the general power of testamentary disposition conferred by section 1270 of the Civil Code: *Estate of Miller*, 158 Cal. 420, 111 Pac. 255. (See page 1536.)

(3) **Limitation upon right as to certain persons.** The will of a member of the Cherokee tribe of Indians who was enrolled and the land filed on after her death, is invalid because it was an attempt to alienate made before the removal of restrictions: *Semple v. Baken*, 39 Okla. 563, 135 Pac. 1141.

The provisions of Mills Ann. Stats., Secs. 3010-11, do not affect the validity of the will of a married woman but operate only on its distributive provisions in case the husband survives and does not consent to the will: *Deutsch v. Rohfling*, 22 Colo. App. 543, 126 Pac. 1126.

At no time in the history of the state of Colorado has a married woman been incapable of making a will, with or without the consent of her husband: *Deutsch v. Rohfling*, 22 Colo. App. 543, 126 Pac. 1126.

Where the law provides that no married woman shall by will devise away from her husband more than one-half of her property without his consent in writing, executed after her death but that it shall be optional with the husband to accept under the will or take one-half of the whole estate, where the husband appears at the probate of the will and files his written consent to its provisions, he is irrevocably bound by such election: *Deutsch v. Rohfling*, 22 Colo. App. 543, 126 Pac. 1127.



A husband can not devise or bequeath away from his wife more than one-half of his property without her consent, and a will purporting to give the whole of his lands to persons other than his wife, where her consent has not been given, will not operate to transfer or affect the half interest to which she is entitled: *Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074.

A testatrix who has a husband but no children has a right to devise one-half of her property to her brothers and sisters without the consent of her husband: *Carmen v. Kight*, 85 Kan. 18, 116 Pac. 231.

A married man may with the consent of his wife given in the manner prescribed by law dispose of his property by will as if unmarried: *Hanson v. Hanson*, 81 Kan. 305, 105 Pac. 444.

Power of testamentary disposition is subordinate to authority given probate court to appropriate the property for support of family of testator, and set apart homestead, as well as for payment of debts: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280.

Probate court may set apart property as homestead though it be specifically devised, thus defeating the devise: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280.

Property and funds set apart absolutely by probate court order for homestead and for maintenance of family do not pass under will to persons taking, though such persons be devisees: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280.

Testator held powerless to prevent widow from taking whole estate if less than \$1500, as provided by section 1469 of the Civil Code, despite section 1270, authorizing every one to dispose of all of his estate: *In re Miller's Estate*, 158 Cal. 420, 111 Pac. 255. (See page 1537.)

(4) **Right of wife to support as limiting testator's control.** (See page 1537.)



### 3. TESTAMENTARY CAPACITY.

(1) **In general.** One may be mentally incompetent to make a last will by reason of the want of development of the mental faculties, although he is neither a lunatic, an idiot, or an imbecile or in any way possessed by delusions: *Estate of de Laveaga*, 166 Cal. 607, 133 Pac. 307.

In the contest of the will in this case on the ground of mental incompetency, the findings of the court to the effect that the testator was not mentally competent are held to be sustained by the evidence: *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801.

Whether a will be reasonable or unreasonable, just or unjust, it is sufficient if it be made according to the forms of law, by one capable in law of making a will and of sound mind and memory at the time: *In re Hayes's Estate*, 55 Colo. 340, 135 Pac. 453.

Testamentary capacity is possessed by one who is in a condition to understand what he is doing, to recall what property he owns, and to intelligently select the objects of his bounty: *In re Hart's Will*, — Or. —, 132 Pac. 526.

As to whether the amount of mental capacity to make a will can be compared with that required to make a contract the conclusion of common sense is that it requires more mind to make some wills than to make some contracts and vice versa, and there is excellent authority for the rule that while contractual capacity implies *prima facie* the capacity to make a will, yet neither is a test for the other: *Murphy v. Nett*, 47 Mont. 38, 130 Pac. 455.

A full blood Creek Indian, who died in March, 1900, could not dispose by will of lands subsequently allotted to his heirs: *Coachman v. Sims*, 36 Okla. 536, 129 Pac. 845.

Evidence that a testator, who was otherwise competent, made a college, in which he had previously shown no interest, his residuary legatee, under the belief that his estate was practically exhausted by specific bequests, when in fact the residue amounted to more than two-thirds of the whole, is



not sufficient to warrant a finding of a want of capacity to make such a provision: *Holmes v. Campbell College*, 87 Kan. 597, 125 Pac. 25.

It is the settled rule in Oregon that if a testator, at the time he executes his will understands the business in which he is engaged, and has a knowledge of his property and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity: *Stevens v. Myers*, 62 Or. 372, 121 Pac. 437.

If a testator has sufficient mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and has sufficient memory to retain all such facts in his mind long enough to have his will prepared and executed, he has testamentary capacity: *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 958.

To be of sound and disposing mind and memory so as to be capable of making a valid will, it is sufficient if the testator has an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and the persons who are the objects of his bounty, and the manner in which it is to be distributed: *In re Huston's Will*, 163 Cal. 166, 124 Pac. 852.

There is no necessary and compelling force in established physical infirmity which carries with it the inference of mental incapacity to make a will. A person may be very feeble or aged and infirm from disease, and yet be capable of disposing of his property: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

Not every form of insanity, nor every mental departure from the normal, will destroy an otherwise valid testamentary act. The rule is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.



Insanity that will invalidate a will must be an insanity of one of two forms: either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. In the latter class of cases, the evidence must further establish that the will itself was the creature or product of such hallucination or delusion, or that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

On a contest of the probate of a will, on the ground of the alleged insanity of the testatrix, the evidence is reviewed and held not to show that the testamentary act was affected in the slightest degree by any or all of the abnormalities attributed to the testatrix, that the evidence of her sound and disposing mind was overwhelming, and that a nonsuit of the contest was properly granted: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

The fact that a testator is a suicide may be given in evidence as tending to establish insanity, but standing alone, proof of that fact is insufficient to show a want of testamentary capacity: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

Where one of the causes relied on by the contestant as tending to show that the testatrix was insane was the fact that she had been accused by her employer with the theft of several hundred dollars a day for several days prior to her discharge from her employment, it was not error to refuse to allow her employer to testify to the amount of such thefts. There being no issue over the truth or falsity of the charge, the exact amount of the alleged peculations was unimportant: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

It is essential to the sound and disposing mind requisite for the making of a will that the testator have an understanding of the nature of the business in which he is engaged, and an understanding and recollection as to his property which he means to dispose of, of his relations to his relatives



and those around him, of the persons who are the objects of his bounty, and the manner in which it is to be distributed: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

It is proper to permit a witness to testify to his observation of the testator's "appearance" with reference to physical and mental conditions. Such testimony is not opinion evidence: *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801.

An adjudication of a testator's incompetency, made in a proceeding for the appointment of a guardian of his person and estate eleven days after the execution of his will, while not conclusive in a contest of the will, as to his incompetency at the time of its execution, is proper evidence to be considered on the issue of want of testamentary capacity at the time of the adjudication, and, in connection with testimony tending to show that his mental condition had not changed during the interim, is admissible on the issue of capacity at the time the will was made: *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801.

In such a contest, in which the finding of the court that the testator was incompetent is sustained by the evidence, the refusal to permit a witness for the proponent, who had only known the testator for a period of ten or twelve days, to testify as an "intimate acquaintance" to her opinion regarding his mental sanity, will not justify a reversal: *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801.

Where a probated codicil to a will was contested upon petition of a daughter of the testator to revoke the probate thereof for unsoundness of mind, as well as on other grounds, and the court found that when the codicil was executed the testator was of sound and disposing mind, it is held that, though there was evidence that he was then seventy-nine years old, was growing weaker physically, and that there was a gradual impairment of his memory and mental faculties, yet there was other evidence to show his testamentary capacity at that time, and that, as soundness of mind is to be presumed, and as the burden on the contestant to show unsoundness of mind at that time was not sustained, the



finding of the court is sufficiently supported: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

To show the condition of one's mind at a given time as respects sanity or insanity, evidence tending to show such condition both shortly before and shortly after the time is admissible: *Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

On a contest of the probate of a will, the evidence is held sufficient to support the conclusion of mental incompetency of the testatrix at the date of the execution of the alleged will: *Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

Testimony regarding the mental incompetency of the testator that he was a man of advanced years, and that his sight was failing, were not circumstances sufficient to justify the court or jury in setting aside a will: *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 779.

In an action to revoke the probate of a will, evidence introduced to show that the testator was irrational held to be too trivial to deserve extended comment: *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 780.

A letter written to the contestant (who managed the property of the deceased), by the proponent prior to the death of the testatrix, advising him of the receipt of a monthly draft for the deceased and as to how much she would need per month for the future, is admissible, as tending to show the actual transaction of the business of deceased by the proponent: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

While the manner in which a person whose sanity is in question is treated by his family is not, taken alone, competent substantive evidence tending to prove insanity (for it is a mere extrajudicial expression of opinion on the part of the family), it is proper evidence when given in connection with the conduct of the alleged insane person under such treatment, as illustrating and explaining such condition: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.



Absolute acquiescence by the person whose soundness of mind is in question in a course of conduct on the part of those around him with relation to his property and personal affairs which no person of sound mind would tolerate or acquiesce in, is competent evidence tending to show an unsound mind: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

Where during a large portion of the time the business of the person whose sanity is questioned is transacted by others by means of letters and cablegrams from one to the other, such letters and cablegrams constitute a part of the *res gestae* in the matter of the actual transaction of business: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

A declaration of any number of legatees or devisees less than all upon the question of the mental competency of the deceased is not admissible in evidence on the issue of competency, for the reason that the interests of the legatees and devisees under a will are several and not joint, and that it would be unjust to allow the interest of one to be affected by the admissions of another with whom he is not in privity: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

A letter written by the proponent to the contestant prior to the death of the testatrix, containing statements going to show that the proponent was of the opinion that the deceased was mentally incompetent, is not improperly admitted, where such evidence is admitted and received not for the purpose of showing a declaration against interest, or admission, or as independent substantive evidence on the issue of competency, or undue influence, but on the theory that on account of the interest of the proponent and her hostility to the contestant he had the right upon the cross-examination of the contestant, when taken by surprise by her answers to certain questions as to matters contained in such letter, to prove by the same her previous statements to the contrary: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

Letters written by the proponent to the contestant showing a departure of the former and the testatrix from the state



for fear of incompetency proceedings, while inadmissible for impeachment purposes as being as to a collateral matter, such admission is not erroneous, where the only objection interposed thereto was the incompetency of the declarations against the other beneficiaries under the will: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

Testimony as to the contents of a letter of the father of the testatrix accompanying his will, in which he recommended the testatrix to the care of her eldest sister on account of her weak mind, is admissible, where it was shown that the testatrix was present at the conversation between the members of the family in which the question of whether the letter should be filed with the will was discussed, and said nothing: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307.

The conduct of a person past the age of childhood and within a few months of the age of majority, at a family gathering, where in her presence and hearing her mental competency is being discussed and the claim asserted and apparently accepted by all present that she is so weak minded as to need the guardianship and care of others throughout her life, and it is being discussed whether or not a writing expressing the view that she is so affected shall be made a public record, is some evidence on the question of her competency at the time: *Estate of De Laveaga*, 166 Cal. 607, 133 Pac. 307. (See page 1538.)

#### REFERENCES.

As to the effect of an adjudication of insanity or existence of guardianship as showing want of capacity to execute contracts, make wills and the like, see note to *In re Will of Van Houten*, 140 Am. St. 346-358.

As to whether part of a will may be set aside for lack of testamentary capacity or undue influence and the remainder upheld, see note 41 L. R. A. (N. S.) 1126.

(2) **As affected by age and physical infirmity.** Upon a consolidated application to probate three wills of the same testatrix where the evidence showed that subsequent to the death of her husband and after the date of the first will her



mind was so weakened from either mental or physical infirmities that she did not have sufficient intelligence to understand the nature and effect of making a will or else had lost the mental power to resist the importunities of those around her, an order admitting the first will to probate was proper: *In re Jeff's Estate*, 73 Wash. 212, 131 Pac. 849.

The fact that a testator is grossly mistaken as to the extent of his estate does not establish a want of testamentary capacity, the true test in this regard being whether he is capable of comprehending the quantity of his property and its value: *Holmes v. Campbell College*, 87 Kan. 597, 125 Pac. 25.

That a delusion may be such as will deprive a testator of testamentary capacity it must be the spontaneous product of the subjective processes of a disordered intellect, inducing a belief without any support in extrinsic evidence. A mere error in judgment upon proven or admitted facts does not constitute a delusion, however much it may be at variance with the conclusion reached by unprejudiced minds from the same facts: *Stevens v. Myers*, 62 Or. 372, 121 Pac. 438.

Hard drinking and frequent intoxication do not of themselves afford sufficient grounds for testamentary incapacity: *Weatherall v. Weatherall*, 63 Wash. 526, 115 Pac. 1079.

Mental capacity to understand and direct the terms of a will made by a man eighty-six years of age to change a former will, is not inconsistent with an insane delusion causing such change: *Harbison v. Beets*, 84 Kan. 11, 113 Pac. 423.

Testamentary capacity is possessed by one who, though he may be in a weakened condition physically, is nevertheless capable and sound mentally and fully understands the contents of the will and the disposition of his property therein provided: *In re Hobbin's Estate*, 41 Mont. 39, 108 Pac. 8.

A person may be very feeble, may be aged and infirm and suffering from disease, and yet be capable of disposing of his property: *In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597.



In absence of incapacity, will is not contestable merely because provisions are unreasonable, unnatural, foolish, or unjust: *In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6.

Evidence held insufficient to support finding of mental incompetency from intemperate habits: *In re Carither's Estate*, 156 Cal. 422, 105 Pac. 127.

One may be incompetent to make a will by reason of want of development of the mental faculties, although he is neither a lunatic, an idiot, nor an imbecile, nor in any way possessed by delusions: *Estate of De Laveaga*, 165 Cal. 307, 133 Pac. 307.

It is held in this contest to the probate of a will on the ground of mental incompetency and undue influence, that the theory of the contestant that the testatrix was neither a lunatic, idiot, nor an imbecile, nor a victim of insane delusions, but was a person of arrested mental development, was amply sustained by competent and properly admitted testimony, portraying a woman utterly incompetent at any time to understandingly and intelligently consider her property with a view of its proper disposition by will, and also utterly incompetent alone and unaided to compose and write the document offered for probate as her last will: *Estate of De Laveaga*, 165 Cal. 307, 133 Pac. 307.

The wills of aged and infirm people, or people sick in mind as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. It may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms: either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, in which the testator is the victim of some hallucination or delusion. And even in the latter class of cases it would not be sufficient merely to establish that the testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was a



creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument: *In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 937.

A testator, although feeble in health, suffering under disease, aged and infirm, has the mental capacity to make a will, if he is able to understand and carry in mind the nature and situation of his property and his relations to his relatives and those around him, with clear remembrance as to those in whom and those things in which he has been most interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing: *Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

The fact that a physician described the condition of the testatrix as senile dementia, and declared such person to be of unsound mind, does not constitute the sort of incompetency or insanity which, in the estimation of the law and of all men of ordinary sagacity and prudence, renders a person incapable of executing contracts or making a will: *In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 935.

Evidence tending to show a weakened memory on the part of the testator, but without any showing of impairment of his ability to grasp the salient facts in relation to his property, its situation, and the objects of his bounty, would not suffice as proof of want of testamentary capacity: *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 780.

Evidence held to show that testatrix possessed testamentary capacity when she signed her will: *In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935. (See page 1538.)

**(3) As affected by fraud, undue influence, etc.** (See page 1539.)



#### 4. FORMALITIES AND EXECUTION.

(1) **In general.** No set form of expression is necessary to constitute a will. All that is required to make an instrument testamentary is that it should show when read in connection with surrounding circumstances and facts, a testamentary intention: *In re Noye's Estate*, 40 Mont. 231, 106 Pac. 358.

The prescribed manner of disposal must be observed with at least substantial strictness: *In re Price's Estate*, 14 Cal. App. 462, 112 Pac. 482.

Conflicting evidence held to sustain finding of due execution and publication of codicil: *In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597.

In this proceeding to revoke the probate of a will, the findings in favor of the proper execution of the will are supported by the evidence: *Estate of Daly*, 166 Cal. 225, 135 Pac. 953.

It is a sufficient subscription of a will in conformity with the statute of wills (Rev. Codes 1907, Sec. 4726) of the state of Montana, when a person capable of making a will who, when she held the pen in her hand knew that she was signing her will and, with the assistance of another person at her request, signed her name to the will: *In re Miller's Estate*, 37 Mont. 545, 97 Pac. 937.

There is a valid execution of a will where the person undertaking to make it has done certain acts with the intention of thereby executing it, leaving undone nothing which he undertook to do to carry out that intention, and the acts done include everything necessary, under our statutes, to the execution of a will: *Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233. (See page 1539.)

(2) **Signature of testator.** Where a testatrix, with the undoubted intention to make her will, caused her name to be subscribed thereto by a third person in her presence and by her direction, such subscription, although the third person omitted to write his name as a witness to the will, is



sufficient to effect its due execution, under sections 1276 and 1278 of the Civil Code: *Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233.

The validity of such a subscription is not affected by the fact that at the time thereof and as part of the same transaction the testatrix also subscribed her mark to the will, but that the signing by mark was incomplete and ineffectual for want of compliance with the requirement of section 14 of the Civil Code, that where a subscription is by mark, the name of the person so signing is to be written near the mark, by a person "who writes his own name as a witness": *Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233.

Testator signing by mark after the writing of his name by request and at his direction constitutes a valid and sufficient execution of the will, notwithstanding the fact that the person who thus writes the testator's name fails to write his own name as a witness thereof, as required by section 14 of the Civil Code: In *Matter of Dombrowski's Estate*, 163 Cal. 290, 125 Pac. 233, citing and approving *Estate of Toomes*, 54 Cal. 509, 35 Am. 83, and *Estate of Langan*, 74 Cal. 353, 16 Pac. 188, and distinguishing *Robertson v. Hill*, 127 Ga. 175, 56 S. E. 289; *Maine v. Ryder*, 84 Pa. 217; *Plate's Estate*, 148 Pa. 55, 33 Am. St. 805, 23 Atl. 1038; *Waller v. Waller*, 1 Gratt. (Va.) 454, 42 Am. Dec. 564, and *Everhart v. Everhart*, 34 Fed. 82. (See page 1540.)

#### REFERENCES.

As to writing name in body of will as a signature thereto, see note 29 L. R. A. (N. S.) 63, 30 L. R. A. (N. S.) 1173, 46 L. R. A. (N. S.) 552.

When will deemed to have been signed or subscribed at the end, see 17 L. R. A. (N. S.) 353-360.

(3) **Publication by testator.** Where it is not alleged that a testator was under any disability at the time of making a codicil, the publication of such codicil amounts to an affirmance and republication of the will: *Stevens v. Myers*, 62 Or. 372, 121 Pac. 443.



Where the attestation clause in a will stated that the will was signed and published as and declared to be the last will of testatrix in the presence of the attesting witnesses who signed at her request and in the presence of each other and one of the attesting witnesses testified that testatrix said in the presence of the other attesting witness that she knew she was executing her will and was corroborated and the other attesting witness testified that he did not hear testatrix say anything about making a will and that she did not ask him to sign as a witness, held sufficient to show that testatrix at the time of subscribing the will declared that the instrument was her will, as required by Rev. Codes 1907, Sec. 4726: *In re Miller's Estate*, 37 Mont. 545, 97 Pac. 936.

All the surrounding facts should be considered in determining whether Rev. Codes 1907, Sec. 4726, has been complied with so as to carry out the intent with which it was adopted and it is not essential that testator should expressly ask the subscribing witnesses to sign or expressly declare the instrument to be his will: *In re Miller's Estate*, 37 Mont. 545, 97 Pac. 941. (See page 1541.)

**(4) Subscribing witnesses.** The wife of a beneficiary is a competent witness to attest the execution of a will and she has no such interest thereunder as will impose upon her husband a forfeiture of his legacy because she was such witness: *White v. Bower*, — Colo. —, 136 Pac. 1054. (See page 1541.)

**(5) Attestation by witnesses.** Although a will has no attesting clause and the attesting witnesses simply signed their names thereto without even designating in the instrument that they signed as witnesses, its due execution, in the absence of evidence to the contrary, is sufficiently proved by the testimony of one of the witnesses, the other not being procurable, to the effect that the will was prepared by him at the dictation of the testatrix, that he signed his name thereto at her request, and that he and the other witness thereupon signed it as such, notwithstanding that he was unable to recollect whether the testatrix at the time the will was executed made any declaration as to the instrument



being her will, or whether she asked him and the other subscribing witness to sign it as such: *Estate of Kent*, 161 Cal. 142, 118 Pac. 523.

Where the memory of witnesses is at fault in establishing a real or necessary incident attending the formal execution of a will, the attestation clause comes to the support of its validity and the law will presume a due execution from the recitation of the requisite facts therein, or even without it, upon the hypothesis that the requirements of law have been duly observed and in a holographic will this presumption is particularly applicable: *Simpson v. Durbin*, — Or. —, 136 Pac. 348.

If witnesses when attesting the execution of a will are in such a place that the testator can see them, if he chooses, they are in his presence within the meaning of the statute: *In re Burnham's Will*, 24 Colo. App. 131, 134 Pac. 257.

If the attesting witnesses when called, admit their signatures, but through defect of memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the form of the attesting clause, unless there be affirmative evidence given to disprove its statements: *Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 400.

Where one of the subscribing witnesses did not hear the will read, was not requested by any one to sign as a witness to the writing as a will, did not see the signature of the testator, and was not informed of the character of the paper until nearly two years afterward, the testator did not within the meaning of the statute, either make publication of the writing as his will nor request both witnesses to attest it: *In re Noye's Estate*, 40 Mont. 190, 105 Pac. 1017.

Where the codicil of a will was admitted to probate on the testimony of one of the witnesses in due form to its execution, and such witness changed his evidence on the contest of its probate, and sustained the contestant, the court properly confirmed the probate not only on the original evidence received at the probate, but also on the further testimony



of the executor who was present when the will was executed, and heard the testator declare in the presence of both the witnesses that he was executing the codicil to his will, and requested the witnesses to sign their names as witnesses, which they did together in his presence: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597. (See page 1542.)

#### REFERENCES.

Signature of witnesses to will before testator signs it, see note 26 L. R. A. (N. S.) 1126.

As to necessity that witnesses see testator sign, or that they see his signature, see note 38 L. R. A. (N. S.) 161.

Trustee or member of a charitable beneficiary as a witness to the will, see note 36 L. R. A. (N. S.) 504.

As to whether the competency of an attesting witness to a will is to be determined as of the time of attestation or of probate, see note 35 L. R. A. (N. S.) 686.

#### 5. INSTRUMENTS INFORMALLY EXECUTED INVALID AS WILLS. (See page 1542.)

#### 6. CODICILS TO WILLS. (See page 1543.)

(1) **In general.** (See page 1543.)

(2) **Reference to the will.** (See page 1543.)

#### 7. INCORPORATING OTHER PAPERS BY REFERENCE. (See page 1544.)

#### 8. WILLS IN FORM OF DEEDS.

(1) **In general.** (See page 1544.)

(2) **Particular examples.** A deed made between husband and wife by which each purported to give all his or her interest in community property to the other, to take effect after the death of one or other of them, with remainder over after the death of the survivor to the heirs at law of both, held to be a mutual or reciprocal will and the separate will of the survivor, and after the death of the wife and revocation by the husband by a remarriage, entitled to probate as



the will of the deceased wife: *Anderson v. Hande*, — Ariz. —, 141 Pac. 726. (See page 1544.)

## 9. CONTRACT TO MAKE A WILL.

An oral contract to make a testamentary disposition of property may be specifically enforced in favor of the promisee, if clear, certain, and definite in its terms, and its enforcement not harsh, oppressive, and unjust as to innocent third parties: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 732; *Parsons v. Cashman*, 47 Cal. Dec. 186, 137 Pac. 1111.

To warrant the specific enforcement of a contract to make a will in favor of a particular person, the contract must be definite and certain and also just and fair: *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986.

It is well established that it is competent for the owner of property to make a contract with another person to bequeath the same to that person at the death of the owner: *Kelley v. Devin*, 65 Or. 211, 132 Pac. 536, following *Rose v. Olliver*, 32 Or. 447 and *Richardson v. Orth*, 40 Or. 252.

An oral contract to make a will, in consideration of the support of the promisor for the remainder of his life, is enforceable in equity; but the agreement must be definite and certain, and the relief not harsh, oppressive, or unjust to innocent third persons, nor against public policy: *Pugh v. Bell*, 21 Cal. App. 530, 132 Pac. 286.

An oral agreement to make a will in favor of a child received into the family and who has faithfully performed his part of the contract, which must be clear, certain, and definite in its terms, and if specific performance would not be harsh and oppressive, and unjust to innocent third parties, will be enforced. Prior to his death testator retaining a life estate for himself, conveyed all his real estate to a trustee for his only other child and a grand-daughter. He left a will leaving his property in accordance with the said oral agreement. In an action brought for specific performance of the oral agreement it was held that the real estate so con-



veyed must be held chargeable with a trust in favor of the plaintiff who was the personal representative of the child in question who had died after instituting the action: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 732.

An action against heirs or devisees to acquire title to real property, because the decedent, under whom they claim, had agreed to leave it by will to plaintiff, is in the nature of one for specific performance of a contract to convey land, and in the trial thereof a jury can not be demanded as a matter of right: *Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147.

An oral agreement between husband and wife that she will make a will leaving to him all the property owned by her at the time of her death, both real and personal, in consideration of real estate owned by him being conveyed to her, is rendered enforceable, notwithstanding the statute of fraud, where, in accordance with its provisions, the title to land paid for by the husband is taken in the wife's name, and she makes such a will and thereafter, in reliance thereon, he expends labor and money in improving the property: *Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147.

A will executed under an agreement founded upon a valuable consideration is contractual as well as testamentary. In the latter aspect it may be revoked without the consent of the beneficiary, but not in the former. Its revocation as an instrument capable of probate is effected by the execution of a new will, and this may be enforced so far as the provisions of the earlier will, which are based on contract, are not violated, but no further: *Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147.

Notwithstanding an agreement by a wife founded upon a valuable consideration, to leave to her husband by will the property owned by her at the time of her death, such property will be subject to sale by the executor, where that is necessary for the payment of valid demands against the estate or of the costs of administration: *Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147.



Where testatrix in pursuance of a contract with her husband, executes a will leaving to him all her property, with a proviso that at such time as he could without inconvenience, he should pay a stated amount to her son, a subsequent will, undertaking to give half her property to a trustee for the benefit of her son, may be enforced to the extent of requiring the payment of the stated amount to the trustee: *Nelson v. Schoonover*, 89 Kan. 388, 779, 131 Pac. 147.

Where the court found that the owner of a farm, with the consent of his wife, made a written contract with their daughter and her husband by which the latter were to live with them on the farm and care for them as long as they lived in consideration of which all their property at their death was to become the property of the daughter and her husband, who substantially and fairly performed the contract and made lasting and valuable improvements on the land; that after the death of his wife the father sold the farm, deprived the daughter and husband of possession, refused longer to live with them, remarried and executed a will leaving his property to other heirs. It was held in an action for specific performance by the daughter and her husband against the other heirs and executor that a resulting trust was fastened upon the proceeds of the sale of the farm in the hands of the executor, in favor of the plaintiffs: *Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878.

Where one has rendered services to another under an oral agreement that he is to be compensated by the devise of real estate, the contract may be enforced irrespective of the question of possession, where the services are of such a character that their value in money can not be satisfactorily determined: *Schoonover v. Schoonover*, 86 Kan. 487, 121 Pac. 485.

The words "to stay with and care for" used to express the consideration of a contract to make a will, have no fixed legal signification. In the light of the situation and circumstances of the contracting parties in this case, they may well indicate personal association, care, and attention, not including the furnishing of groceries, other necessities, and



medical attention, and the parties themselves having so interpreted the contract, that will be accepted as the true meaning: *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 357.

A contract to make a will, whereby the will, if made, would devise land worth \$2300 subject to debts to the amount of \$600, is not inequitable and will be specifically enforced, although the promisor lived and enjoyed the consideration for only eighteen months: *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351.

Plaintiffs who claimed to be the equitable owners of an estate, alleged and undertook to show that their uncle entered into an agreement with his wife that he would execute a will giving all his property to her on condition that she would in turn leave the property to plaintiffs; that he had made the will in compliance with this agreement and had fastened a trust upon the property in favor of plaintiffs but that the wife had failed to carry out the agreement on her part and had died without making a will. To sustain their contention it was necessary for plaintiffs to show by clear and convincing proof that the agreement was made and a trust created in their favor. The trial court found against their contention, which finding was confirmed on appeal: *Overly v. Angel*, 84 Kan. 259, 113 Pac. 1041.

In this action to enforce an alleged contract in the nature of an agreement to make a will in favor of the plaintiff, the evidence supports a finding of such contract, resting in parol and made in 1851, whereby the sole surviving parent of the plaintiff surrendered the plaintiff, when a child, to the grantor, and ancestor of the defendants, upon the understanding that he and his wife would receive the plaintiff into their family and raise him as their child, and that "he should heir and share equally" with their own daughter: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

The language of such agreement implies an undertaking on the part of the promisor and his wife that on their deaths they will divide their property equally between the plaintiff and their natural child, no other child having been born to



them: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

Upon the death of the promisor such oral contract may be specifically enforced in favor of the promisee, who has performed his part thereof; the recent amendments to sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure, adopted long after the contract was fully executed on the part of the promisee and whatever rights he had thereunder were vested, having no application: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

Such a contract will be enforced not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling the defendants, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement. And where the promisor had, in violation of his agreement, conveyed his property to his only natural child and his grand-daughter, the decree should direct them to convey to the plaintiff according to their respective rights, that is, both must share equally in the loss: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

If the promisee commences an action to set aside a conveyance, but dies before the case comes to trial, the action may be continued by his administrator, who is also his heir, in both his representative and individual capacity: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

A money judgment, recovered in such action, should run in favor of the plaintiff in his representative capacity as administrator: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

Where the promisor conveyed all his real property in his lifetime and at his death left an estate consisting solely of money, the decree of distribution in the matter of his estate is not conclusive upon the right of the promisee under the agreement of the promisor to make him heir: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.



The promisee is not required, as a condition precedent to suing to set aside the conveyance, to present his claim against the estate of the deceased promisor: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

In such action not only is it competent to show what was said by the parties at or about the time the agreement was entered into, but declarations confirming the agreement or statements as to its import by the promisor and his wife, who agreed to it, made during their lives, are admissible: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

A contract to make a will, in order to be a proper subject for specific performance, must *prima facie* be fair, founded upon an adequate consideration, definite as to the conditions imposed and the obligations assumed, and, if the purported consideration is personal services, the agreement for them must be definite and certain not only with reference to their nature and character, but also with reference to the time of their continuance: *Parsons v. Cashman*, 17 Cal. App. 610, 137 Pac. 1109.

An agreement whereby a woman promises to make a will in favor of her nephew in consideration of his becoming an inmate of her home, assuming the obligations of a son, and assisting her in domestic and business affairs, is indefinite in an essential particular if silent as to the length of time for which such services are to be continued: *Parsons v. Cashman*, 17 Cal. App. 610, 137 Pac. 1109.

If it appears that such promise to make a will has not induced the promisee to relinquish anything of present or prospective value or advantage, but has operated to his profit rather than his detriment, and the agreement lacks fairness, specific performance will not be decreed: *Parsons v. Cashman*, 17 Cal. App. 610, 137 Pac. 1109.

The sufficiency of a purported or claimed consideration for a contract to make a will must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments: *Parsons v. Cashman*, 17 Cal. App. 610, 137 Pac. 1109.



When the promisor conveyed part of his property to his daughter and grand-daughter in violation of his agreement, the promisee's right of action in respect thereto did not accrue until the promisor died without making the agreed disposition of his property, so that an action brought upon the death of the promisor is not barred by the statute of limitations, although the conveyance was made many years before: *Rogers v. Schlotterback*, 47 Cal. Dec. 99, 138 Pac. 728.

Where a son conveyed certain real property to his mother upon an oral agreement that she should reconvey the same to him at her decease, this agreement is the same as though she agreed to make a will in his favor covering this property: *Keefe v. Keefe*, 19 Cal. App. 310, 125 Pac. 929.

Where people promised and agreed that "they would take said plaintiffs to their home and would take good care of them, and would rear and educate them in a suitable and proper manner, and that they would treat them in all respects as their own children," this does not show any promise or agreement on the part of such people to the effect that they would bequeath or devise to them any of their property. There is no legal obligation resting on any parent to will any property to a child, if he does not feel so disposed; and, if he does not, the child has no cause of action: *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986.

An oral contract to make a will, in consideration of the support of the promisor for the remainder of his life, is enforceable in equity. But the agreement must be definite and certain, and the relief not harsh, oppressive, or unjust to innocent third persons, or against public policy: *Pugh v. Bell* (Cal. App.), 132 Pac. 286.

Where it is found, in an action to enforce an oral agreement to make a will, that the contract was made, that it was fair and equitable, and that the value of the services performed by the plaintiff thereunder was not capable of being estimated in money, it is unnecessary further to find the changes and sacrifices made by him in reliance upon the contract: *Pugh v. Bell* (Cal. App.), 132 Pac. 286.



In this action to determine the ownership of certain property, it is held that the evidence sustained the finding that a contract whereby an intestate agreed to will his property to the plaintiffs in consideration of their supporting him for the remainder of his life had been mutually abandoned: *Pugh v. Bell* (Cal. App.), 132 Pac. 286.

An oral agreement by a sister to remove from her parents' home and live with her brother as his housekeeper and to care for him, upon his promise that she shall have his property at his death, when faithfully kept by her, affords solid grounds for the exercise of the power of a court of equity by a decree for specific performance: *Smith v. Cameron*, — Kan. —, 141 Pac. 596.

Specific performance of a contract to leave property to a child by will, in consideration of his living with the promisor, will be specifically enforced in case of the child's fulfillment of the contract and the promisor's death without having made the will as agreed: *Oles v. Wilson*, — Colo. —, 141 Pac. 496. (See page 1546.)

#### REFERENCES.

As to contracts to make wills, see note, 102 Am. St. 240.

### 10. ESCROW DEED, WHEN NOT A WILL. (See page 1546.)

#### REFERENCES.

As to gift as a fraud on contract to will property, see note 20 L. R. A. (N. S.) 1154.

### 11. DEED CONSTRUED IN AID OF WILL.

When the grantor had, by previous holographic will, devised to the grantee the same property subsequently conveyed to him by deed, which was in fact an accomplishment of his wish previously expressed in his will, and the deed was drawn by the attorney of the grantor, to whom he expressed a wish to convey the property to the grantee, and there is nothing to indicate that there was any fraud or un-



due influence exercised by the grantee, or to show that the grantor, though afflicted with cancer, was not in the full possession of his mental faculties, the delivered deed can not be set aside by the executor of the deceased grantor: *Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551.

An offer by letter to make a gift of property after death is merged in a subsequent deed and bill of sale duly recorded so that the donee's rights are under the latter and not under the letter: *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 860.

Where a testator gives pecuniary and specific legacies of personal property and refers to a deed which he had given to his son of certain specific real estate and then gives all his real and personal property to his wife, such latter gift will be construed as a residuary devise and bequest so that the other legacies may take effect as it was the evident intention of the testator that they should: *Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1083. (See page 1546.)

#### REFERENCES.

The question of the distinction between a deed and a will is considered in the note to *Moody v. Macomber*, 134 Am. St. 758.

### 12. HOLOGRAPHIC WILLS.

(1) **In general.** A writing, though sufficient in form and execution as a holographic will, which it is manifest on its face that the writer did not intend it as a present disposition of his property, but merely expressed an intention to dispose thereof at some future time, is not a will and probate thereof is properly refused: *In re Jensen's Estate*, 37 Utah 428, 108 Pac. 928. (See page 1546.)

#### REFERENCES.

Violation of requirement that holographic will shall be written by testator, see note 26 L. R. A. (N. S.) 1145.

Sufficiency of showing that paper offered as a holographic will was intended as such, see note 33 L. R. A. (N. S.) 1018.

(2) **Formalities in executing.** The omission of the month in the date of a holographic will is fatal to the validity of the



instrument: *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96.

A holographic will in which a portion of the date is printed and not in the hand writing of the testator is invalid even though in strict compliance with the law in all other respects: *In re Noye's Estate*, 40 Mont. 190, 105 Pac. 1018.

Holographs are usually required to be wholly written, dated, and signed by testator himself. "4-14-07" held sufficient within section 1277 of the Civil Code, requiring holographs to be dated: *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

Purported date, "Dated this — day of —, 1906," held insufficient within section 1277 of the Civil Code, defining holographic wills as those "entirely written, dated, and signed by hand of testator himself": *In re Price's Estate*, 14 Cal. App. 462, 112 Pac. 482.

"Date" means day, month, and year: *In re Price's Estate*, 14 Cal. App. 462, 112 Pac. 482.

The date of a holographic will may be abbreviated and may be expressed in numerals. A date written "4-14-07" is sufficient, and will be construed as meaning April fourteenth, nineteen hundred and seven: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

The omission of the month in the date of a holographic will is fatal to the validity of the instrument: *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96.

Two letters can not be taken together as constituting a holographic will, where the first one, though testamentary in character, is not dated, while the second one, though dated, is not testamentary in character and does not so refer to the first as to incorporate it: *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96.

A paper not testamentary in character may be construed with one having that character, when the latter has, by proper reference to the former, incorporated it within itself. But before an instrument may be incorporated in another



by reference, the reference must be certain, clear, and unambiguous: *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96.

Under section 1276 of the Civil Code, requiring a holographic will to be "subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto," a showing that another person, in the testator's presence and at his direction, signed the testator's name to the will meets all the requirements of the statute: *In Matter of Dombrowski's Estate*, 163 Cal. 290, 125 Pac. 233.

Where in a holographic will the testator, after making various gifts of both personal and real property without using the technical word "devise" or "devisee" to distinguish the gift of realty, speaks of the residue of his estate, after paying all the "bequests herein provided for," and after disposing thereof, provides that "should any of the legatees herein provided for die before my death, then the legacy provided for him or her shall be divided equally among the residuary legatees," such gift over legacies will be construed to include both real and personal property: *Estate of Henderson*, 161 Cal. 354, 119 Pac. 496. (See page 1547.)

#### REFERENCES.

As to holographic wills, see note 104 Am. St. 22.

(3) **Holographic will by married woman.** (See page 1548.)

### 13. NUNCUPATIVE WILLS.

Nuncupative wills are not valid in the state of Wyoming: *In re Thornton's Estate*, — Wyo. —, 132 Pac. 135.

Testimony in support of a nuncupative will will not, under the laws of the state of Washington, be received unless it be offered to a court of probate within six months after the testamentary words have been spoken: *In re Greenleaf's Estate*, 69 Wash. 478, 125 Pac. 790. (See page 1548.)

Probate Sup. 28.



#### 14. MUTUAL OR RECIPROCAL WILLS.

A provision in a mutual will that in the event of the death of either of the testators, if the survivor shall continue living for thirty days thereafter the whole estate of the deceased testator should go to the survivor, is not invalid as suspending the vesting of the estate for that period: *Estate of Cross*, 163 Cal. 778, 127 Pac. 70.

An oral agreement to execute mutual wills is within the statute of frauds and where one party subsequently makes another will the other party can not have specific performance of the original oral agreement: *McClanahan v. McClanahan*, — Wash. —, 137 Pac. 479.

An agreement to make mutual wills on the basis that the survivor should leave his or her property to a particular person is valid if performed by the making of the wills and the acceptance by the surviving party of the fruits of the agreement, but it is valid only as a contract, the performance of which by one party and acceptance by the other has taken it out of the operation of the statute of frauds. It is no objection to the probate of a will that it violates such an agreement, or revokes a former will made in pursuance of it. While such former will is revoked as a will it still stands as evidence of the contract: *In re Burke's Estate*, — Or. —, 134 Pac. 13.

A contract in order to render mutual wills irrevocable must be in writing and is of no force unless evidenced in writing or partially performed so as to relieve it from the operation of the statute of frauds. The mere making of a will in pursuance of a contract required by the statute of frauds to be evidenced in writing is not such a part performance of the contract as to render it enforceable: *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1043, 1046.

An instrument executed by husband and wife owning community property and having no issue, whereby each gave to the other all his or her interest in the property effective on his or her death with remainder over after the death of the survivor to the heirs at law of both, is a joint and



mutual will: *In re Anderson's Estate*, 14 Ariz. 502, 131 Pac. 975.

Joint or mutual wills, made upon proper understanding and executed pursuant to a contract or policy designed to settle the probate interests of the testators and looking to the just provision of those having a claim upon their bounty, partake of the nature of a contract and may be specifically enforced: *Prince v. Prince*, 64 Wash. 552, 696, 117 Pac. 257.

The survivor of a mutual will contract can not revoke same after the death of the other without revocation: *Prince v. Prince*, 64 Wash. 552, 696, 117 Pac. 258.

That a husband who was in good health agreed to make a will devising all his property to his wife who was in a condition of health which it was believed would soon result in death, in consideration of her making the same sort of a will in his favor rather tends to show a disposition to overreach her than to enter into an agreement for her benefit or even for their mutual benefit: *Betcher v. Brady*, 52 Wash. 644, 101 Pac. 222.

A joint and mutual will, executed by husband and wife, by which, after the death of either, a survivorship of thirty days is made a condition precedent to the vesting of the estate, will not be construed as failing to vest title during the thirty days, since the rules and laws of inheritance and succession interposed wherever the will was silent, with the result that title vested in the heirs, devisees, or legatees, subject to divestiture if either spouse should survive the other for more than thirty days: *Estate of Cross*, 163 Cal. 778, 127 Pac. 70. (See page 1549.)

#### REFERENCES.

As to mutual or reciprocal wills generally, see note to *Robertson v. Robertson*, 136 Am. St. 592-605.

Revocability of mutual will, see note 27 L. R. A. (N. S.) 508.



### 15. FOREIGN WILLS.

Where a testator executes two separate and distinct wills, one relating solely to property at his domicile and the other relating solely to property situated in a foreign state or county, both are valid if executed, attested, and proved in accordance with the laws of the place where the property disposed of is situated: *Thompson v. Parnell*, 81 Kan. 119, 105 Pac. 502. (See page 1548.)

### 16. NONINTERVENTION WILLS.

It is the policy of the court to put a most liberal construction on laws relating to the administration of estates without the intervention of the court to the end that the object intended (that is, the saving of costs and the burdening and clouding of titles with court proceedings) could be avoided by those who have property subject to testamentary disposition. The object of the law being to give a testator the right to provide for the settlement of his own estate, no construction should be put upon it that will defeat this laudable purpose. An executor under a nonintervention will is a trustee deriving his power from the will and not subject to the control of the court: *Fulmer v. Gable*, 73 Wash. 684, 132 Pac. 641.

Under the statutes of Washington relating to nonintervention wills if the trustee is delinquent the court will issue letters of administration and proceed to a settlement of the estate in the manner provided by law: *Fulmer v. Gable*, 73 Wash. 684, 132 Pac. 642.

In the case of a nonintervention will the court sitting in probate has no jurisdiction to make orders with reference thereto: *In re Guye's Estate*, 63 Wash. 167, 114 Pac. 1042, 132 Am. St. 1111.

An intention of a testator to dispense with administration must be evidenced by express words in the will or by necessary implication: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 256.



The only purpose of the adjudication of solvency in the case of nonintervention wills is to determine whether the estate shall be administered according to the provisions of the will or according to the provisions of the statute. The executor is the representative of the estate before the adjudication of solvency as well as afterwards and notice to creditors must be published whether the estate be solvent or insolvent: *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1029.

After a nonintervention will has been proven, the estate adjudged solvent and the executors named in the will have accepted the trust, the estate is removed from the jurisdiction of the probate court, except as is otherwise provided in the statute in reference to nonintervention wills, and a court of equity is thereafter the proper forum for the determination of issues arising in relation thereto: *Clarke v. Baker*, 76 Wash. 110, 135 Pac. 1028. (See page 1550.)

#### 17. INSTRUMENTS CONSTRUED NOT TO BE WILLS.

The question as to whether an instrument is a deed or a will may be tested by the following proposition: Did the maker intend to convey any estate or interest whatever to vest before his death and upon the execution of the paper, or, upon the other hand, did he intend that all the interest or estate should take effect only at his death? If the former, it is a deed; if the latter, it is testamentary and revocable: *Deckenbach v. Deckenbach*, 65 Or. 160, 130 Pac. 732.

A widow owning certain premises formerly her home in another county, entered into an "agreement for maintenance" by which she was to furnish the land for the joint use and occupation of herself and a distant relative, G., she to have the right to use and make her home in the house during her life, he to occupy and cultivate the land, keep it in reasonable repair, pay the taxes, treat her kindly, and provide for and maintain her in health and sickness in a comfortable manner, and in lieu of clothing to pay her \$100 the first of each January. She covenanted that upon her



death the agreement should stand for, convey and vest in G. the fee simple title as if a good warranty deed upon sufficient consideration had theretofore been made. She retained the option to terminate the contract upon the failure of G. to carry out his part thereof, in which case he was to give her possession. Before the land could be occupied the widow died. G. had assisted for a few weeks in her care and he brought her remains for burial in the neighborhood of the land, paying the medical and funeral expenses. Held, that while he might recover from her estate for his services and expenses, neither he nor his grantee was entitled to the land: *Glover v. Fillmore*, 88 Kan. 545, 129 Pac. 144.

Writing attached to will, testamentary in character but not executed with formalities required for wills, held inadmissible in evidence in favor of devisee in proceedings on petition for distribution: *In re Benner's Estate*, 155 Cal. 153, 99 Pac. 715.

An instrument is testamentary in nature only when it appears from its terms that the intention of the maker is that it should not be operative to dispose of the property, or of any interest therein, present or future, until his death. If the instrument, according to its legal effect, passes at the time of its execution a present interest or title in the property, although it may be only an interest in a future estate and may be subject to defeat on the happening or nonoccurrence of a future event, it is a present conveyance and not a will: *Tennant v. John Tennant Memorial Home*, 47 Cal. Dec. 509, 140 Pac. 242.

An order on a bank to pay a specified sum to the payee, "if countersigned across the back" by the drawer and presented in his lifetime, and if presented after his death then to pay without being countersigned, is not open to the objection that such check or order was an ineffectual attempt at a testamentary disposition. On its face, the instrument can not be so regarded. It is a valid and binding obligation on which the plaintiff may recover: *Nassano v. Tuolumne County Bank*, 20 Cal. App. 603, 130 Pac. 29.



The provisions of sections 4766, 4772, Revised Codes of Montana, are rules of interpretation merely, and have nothing to do with the prerequisite steps which must be shown to have been taken in executing a paper before it may be regarded as of a testamentary character. Unless these appear to have been taken by the testator the paper never assumes such a character and is a mere nullity: *In re Noyes' Estate*, 40 Mont. 231, 106 Pac. 357. (See page 1550.)

## REFERENCES.

Sufficiency of letters as will, see note 17 L. R. A. (N. S.) 1126-1129.  
What is testamentary capacity, see note 27 L. R. A. (N. S.) 1.

## II. REVOCATION OF WILLS.

## REFERENCES.

As to what constitutes a testamentary writing, see note, 89 Am. St. 486.

As to effect on validity of will of statute passed after death of testator, see note Ann. Cas. 1912D 348.

Revocation of codicil as affecting will, see note 46 L. R. A. (N. S.) 983.

## 4. REVOCATION BY SUBSEQUENT WILL OR CODICIL.

A writing executed with the solemnity of a will but which contains nothing more than the revocation of a former will is a "will" within the meaning of the Washington statute requiring the revocation of a will to be by subsequent will, or by burning, etc.: *In re Pierce's Estate*, 63 Wash. 437, 115 Pac. 837.

Though a subsequent will contains a clause expressly revoking an earlier will, yet if such subsequent will is defectively executed, the revocatory clause does not take effect: *Leard v. Askew*, 28 Okla. 300, 114 Pac. 251.

Two wills by the same testator, in the execution of both of which the statutory requirements have been met must be construed together unless the former has been revoked by



the testator as required by the statute: *In re Noyes' Estate*, 40 Mont. 231, 106 Pac. 357.

A prior will is not revoked by a codicil thereto, unless the latter contains words of express revocation or provisions wholly inconsistent with the terms of the former. In all other cases the prior will remains effectual, so far as consistent with the provisions of the subsequent will or codicil: *Estate of Cross*, 163 Cal. 778, 127 Pac. 70. (See page 1552.)

#### REFERENCES.

As to revocation of will by invalid or inoperative codicil, see note 20 Ann. Cas. 1001.

### 5. REVOCATION BY MARRIAGE, ETC.

A written consent that his wife might devise or bequeath away from him more than one-half of her property was freely and fairly executed by the husband in strict compliance with the statute authorizing such consent after reading the will and learning the disposition which his wife intended to make of her property. Later he gave her written notice that he had revoked such consent, and after her death he claimed that he was entitled to one-half of the property of which she died possessed. Held that the husband did not have the right to revoke the consent and was not entitled to a share of his wife's property: *Chilsen v. Rogers*, 91 Kan. 426, 137 Pac. 936.

The subsequent marriage of an unmarried woman revokes her will executed before marriage, Civil Code, Sec. 1024, and under Sec. 1090, providing that the validity of wills is governed, as to real property in South Dakota, by the law of that state and as to personal property by the law of the domicile of the testator, a will of a nonresident single woman subsequently marrying, disposing of both realty and personalty, is revoked, though admitted to probate as a foreign will, so far as it relates to the real estate, but is valid so far as concerns the personalty in the state of South Dakota: *Cornell v. Burr* (S. Dak.), 141 N. W. 1083.



A marriage, the wife surviving, ipso facto revokes the prior will unless the wife is mentioned or provided for as stated in paragraph 4216, Revised Statutes 1901 of Arizona: *In re Anderson's Estate*, 14 Ariz. 502, 131 Pac. 975.

The true construction of the statute of the state of Washington (Ballinger's Ann. Codes and Stats., Sec. 4598 [Pierce's Code, Sec. 2344]) is that, if after making any will the testator shall marry and the wife shall be living at the time of the death of the testator, such will shall be deemed revoked unless the wife be provided for in the will: *In re Adler's Estate*, 52 Wash. 539, 100 Pac. 1024.

A deed testamentary in character may be revoked by the testamentary grantor at any time: *Simmons v. McComber*, 60 Wash. 469, 111 Pac. 581.

Though a bond covenant or agreement for a valuable consideration to convey real property, specified in a last will previously made, is not deemed a revocation of such prior devise, the voluntary conveyance for a valuable consideration by a testator of part of the land included in the devise is implied by a revocation thereof pro tanto: *Watson v. McLeuch*, 57 Or. 446, 110 Pac. 484.

A devise of land, whether special or general, is revoked under section 1304 of the Civil Code by a sale of the land before the death of the testator: *Estate of Benner*, 155 Cal. 153, 99 Pac. 715.

A deed executed by one insane to another who has knowledge of the mental capacity of the grantor, and who gives no substantial consideration for the property, is an absolute nullity, which does not operate to revoke a valid will previously made by the grantor and a devisee under the will has sufficient interest to justify him in maintaining an action against the grantee to declare the deed to be void, although there has been no prior disaffirmance of the deed, or the tender back of the nominal consideration paid by the grantee: *Bethany Hospital Co. v. Phillippi*, 82 Kan. 64, 107 Pac. 530.



Accidental destruction, as by conflagration, does not revoke: *In re Patterson's Estate*, 155 Cal. 626, 102 Pac. 941, 132 Am. St. 116. (See page 1552.)

#### REFERENCES.

As to whether an attempted alteration of a will revokes the instrument, see note to *Teed's Estate*, 133 Am. St. 899.

Effect of statute making wife an heir of husband, upon rule that marriage alone, without birth of issue, does not revoke a man's will, see note 25 L. R. A. (N. S.) 182, 34 L. R. A. (N. S.) 1021.

Settlement of property rights between husband and wife on account of divorce as implied revocation of will, see note 70 L. R. A. (N. S.) 1073.

Power of one lacking testamentary capacity to revoke will, see note 18 L. R. A. (N. S.) 99, 100.

Sufficiency of provision as to after-born child to prevent revocation of will, see note 43 L. R. A. (N. S.) 1195.

Attempt to revoke portions of a will by burning, tearing, cancelling, obliterating, or destroying, see note 38 L. R. A. (N. S.) 797.

Effect of interference with revocation of a will, see note 41 L. R. A. (N. S.) 105.



## CHAPTER II.

### CONSTRUCTION AND INTERPRETATION OF WILLS.

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#### 1. CONSTRUCTION OF WORDS AND PROVISIONS.

(1) **In general.** A testator by one paragraph of his will gave the entire use of his residuary estate to his wife for life "except as hereinafter qualified," with remainder to his son. He then provided that in the event of his wife marrying again the bequests in her favor should immediately



terminate and in lieu thereof she should take one-third of his estate and the son should take the other two-thirds. The next paragraph provided that in the event of the son predeceasing the testator without issue the entire estate should go to the wife absolutely. It was held that the provisions of the will did not manifest any intention on the part of the testator to restrain or discourage marriage by his widow, but simply postponed any division of the residue between her and the son while she remained unmarried and that there was nothing in the language of the will creating any prohibited condition imposing a restraint upon marriage: *Estate of Fitzgerald*, 161 Cal. 319, 119 Pac. 96.

The cardinal rule in the construction of wills is to have regard to the directions of the will and the true intent and meaning of the testator to be derived primarily from the will itself, and, if the same is not contrary to some positive rule of law or against public policy to give it effect just as written: *Tuckerman v. Currier*, 54 Colo. 25, 129 Pac. 214.

A bequest in a will of all the testator's "interest in the estate" of a named decedent will be construed to pass not only such interest as vested in him as a beneficiary of such estate, but also such further interests as he may have acquired in the property thereof by succession or bequest from other beneficiaries where such estate was in process of administration at the time of the death of the testator and his interests therein constituted the whole of the property left by him: *Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33.

In Oregon the term "heirs" or other words of inheritance are not necessary to create or convey an estate in fee simple, under L. O. L., Sec. 7103, and under Sec. 7344 a devise of real property is to be taken as a devise of all the estate or interest of the testator therein unless it clearly appears that he intended to devise a less estate or interest: *Irvine v. Irvine*, 67 Or. —, 136 Pac. 19.

In construing a will the meaning of the words used will be expounded or restricted so as best to express the purpose and intent of the testator: *Blair v. Blair*, 82 Kan. 464, 108 Pac. 827.



Where a testator having ample means makes a liberal provision for the "support and maintenance" of his widow, those words will be given a broad and liberal significance when no language is used in connection therewith which tends to restrict or limit their meaning: *Blair v. Blair*, 82 Kan. 464, 108 Pac. 827.

It is a fundamental and indisputable proposition that wherever doubt arises as to the meaning of a will, such doubt is resolved by construction, and that construction is of one law. It is an application of legal rules governing construction, either to the will alone or to properly admitted facts, to explain what the testator meant by the doubtful language: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168.

All instruments testamentary in character, executed by the same testator, are to be construed as one instrument: *Estate of Cross*, 163 Cal. 778, 127 Pac. 70.

Where errors in description or designation are found, so that, however the will may be construed, the construction results in rejecting some part of such designation or description, the construction is one of law, because it necessarily results in striking from a written instrument some words or phrases contained therein as being erroneous and not expressing the true meaning and intent of the testator: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 169.

There is no rule in the construction of wills which prefers a name to a description: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 169.

The matter is clearly expounded in *Thebald on Wills*, page 268. He says: "Sometimes a correct name is given, coupled with an erroneous description. There is a person of that name, but no one to whom the description applies. The person of that name takes. *Veritas nominis tollit erroneam demonstrationis.*" On the other hand, if there is no one who answers to the name, but there is a person who answers to the description, the latter may take. "*Nihil facit error nominis cum de corpore constat*": *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 169.



Where a person is indicated by name and description, and there is no one who answers both name and description, but there is some one who answers the name and some one who answers the description, for the purpose of ascertaining whether there is a description which is not consistent with the name, the whole will must be looked at. In these cases the person intended must be ascertained by a consideration of all the circumstances of the case. It has been said that "there are more instances in which the description prevailed than in which the name prevailed": *Estate of Donnellan*, 164 Cal. 14, 124 Pac. 166, 169.

In construing a will, inquiry should be directed to the meaning of the words employed and the intent of the testator will be derived therefrom. Such words should receive an interpretation which will give to every expression some effect rather than one which will render any of the expressions inoperative: *Estate of Robinson*, 159 Cal. 608, 115 Pac. 49.

A testator, both at the time of execution of his will and of his death, had surviving one son and two daughters, and two grandchildren, the issue respectively of a deceased son and daughter. By his will, after giving pecuniary legacies of \$75,000 to each of such grandchildren, he left the entire residue of his estate to a trustee in trust to pay one-third of the net income thereof to each of his surviving children during his or her natural life, and "upon the death of either of said children without issue, to pay his or her one-third share of said net income to the survivors of them, share and share alike, and to the children of any deceased child by right of representation." The will further provided that upon the death of either of said children leaving issue, one-third of the original trust estate with its accretions shall at once descend to and vest in the issue of such deceased child, and upon the death of the last survivor of said children, all the property and estate representing the one-third share or interest of any child who may have died without issue shall vest absolutely in and go to the heirs at law of such child so dying without issue. The court held that upon the death of the surviving son, without issue, the one-third share of the net income of the trust estate which would have gone to



him had he continued to live passed to the surviving daughters of the testator, to the exclusion of the children of the children of the testator who had died prior to his death: *Bemis v. Cookson*, 160 Cal. 743, sub nom. *Cookson v. Hamilton*, 118 Pac. 116. (See page 1566.)

#### REFERENCES.

As to the construing together of the will and its codicil, see note 28 Am. St. 353.

As to the effect in a will of an invalid clause upon an otherwise valid clause, see notes 3 Ann. Cas. 950, 18 Ann. Cas. 473.

(2) **Punctuation not to be regarded, when.** A rule of construction as applied to wills is that punctuation is not to be regarded if any change therein will render the meaning of the instrument more obvious: *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87.

## 2. INTENTION OF THE TESTATOR.

(1) **In general.** The primary purpose of all rules to be applied in the construction of wills is to ascertain the testator's intention, not some undeclared purpose which may be imagined to have been in his mind, but the intention disclosed by the words he has used. As an aid to the interpretation resort may be had to the circumstances under which the instrument was executed: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

The primary purpose of all interpretation of wills is to ascertain the testator's intent, as disclosed by the language he has used. Each case depends upon its own peculiar facts and precedents have comparatively little value: *Estate of Henderson*, 161 Cal. 353, 119 Pac. 496.

Comp. Laws 1907, Sec. 2767, providing that a will is to be construed according to the intention of the testator controls all other provisions in which rules of construction are given, in that no rule is to be given effect except to ascertain the real intention of the testator as expressed by him, and rules of construction are to be resorted to as mere aids for the



purpose of ascertaining the real intention of the testator: *In re Pappleton's Estate*, 34 Utah 285, 97 Pac. 140.

The cardinal rule of construction of a will is to ascertain the testator's intent, which is to be ascertained from a full view of everything within the four corners of the instrument: *Jones v. Broadbent*, 21 Ida. 535, 123 Pac. 477.

A testator left him surviving a son, two daughters, and two grandchildren. By his will he left the residue of his estate to a trustee in trust to pay one-third of the net income thereof to each of his surviving children for life, and "upon the death of either of said children without issue, to pay his or her one-third share to the survivors of them, share and share alike, and to the children of any deceased child by the right of representation." The will further provided that upon the death of either of said children leaving issue, one-third of the original trust estate with its accretions shall at once descend to and vest in the issue of such deceased child, and upon the death of the last surviving of said children all the property and estate representing the one-third share or interest of any child who may have died without issue shall vest absolutely in and go to the heirs at law of such child so dying without issue. Held that upon the death of the surviving son without issue, the one-third share of the net income which would have gone to him, passed to the surviving daughters to the exclusion of the children of the children of the testator who had died prior to his death: *Bemis v. Cookson*, 160 Cal. 743, 118 Pac. 116.

In construing the clauses of a will the purpose sought to be accomplished is to discover, if possible, the testator's intent with respect to the disposition of his property after death, and when that intention is ascertained it is controlling unless it can not be carried in effect without a violation of the rules of law: *Kaser v. Kaser*, — Or. —, 137 Pac. 189.

It is not proper to substitute the will and judgment of the jury for that of the father in making provision for a son's education and support during minority even though that of the former may be wiser than that of the father: *Anderson v. Anderson*, — Utah —, 134 Pac. 558.



In the interpretation of the language of a will a liberal construction is to be applied in order to determine the testator's intention so as not to defeat the purpose of his bounty: *Kerr v. Duvall*, 62 Or. 470, 125 Pac. 831.

The intention of a testator is the guide in construing the terms of his last testament and, if his design can reasonably be ascertained, it controls the disposition of his property: *Love v. Walker*, 59 Or. 95, 115 Pac. 301.

A will should be construed so as to give effect to the desire and intention of the testator in so far as is possible to do so from the language used; and in placing a construction on the will, the courts will avoid and prevent intestacy, if reasonably possible without doing violence to the evident intent of the instrument. In looking for this intent, not only the language used but the entire purpose and scheme of the instrument must be given effect and regard must be had not only to the property disposed of, but to the surroundings, the persons named as devisees or legatees, and their relation to the testator, and what the testator evidently had in mind in employing the language used: *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1107.

The cardinal rule to be applied in the construction of a will is to gather the intent of the testator from the language of the will and this intent is to be ascertained from a full view of everything within the "four corners of the instrument," but this rule must be applied in connection with that other rule to the effect that a clearly expressed intention in one portion of the will is not to yield to a doubtfully expressed intention in another portion: *Wilson v. Linder*, 18 Ida. 438, 110 Pac. 274, 138 Am. St. 213.

In the construction of wills, the intention of the testator governs, and rules for determining the intention are but advisory and not controlling: *Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1083.

Testator's intention, gathered from the entire will, controls, if consistent with the law: *In re Washburn's Estate*, 11 Cal. App. 735, 106 Pac. 415; *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

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Intention includes necessary implications from language used as well as meaning of explicit language: *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

A jury is not authorized to overturn a will merely because its disposition does not conform to the jurors' notions of justice or propriety: *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 779.

Where a testator gave his estate to a nephew and another who had been raised in his family as a son, to the exclusion of other nephews, it can not be said that such will is unjust, where such beneficiaries were the only intimate associates of testator and had always assisted him in the management of his business, and the contestants lived at a distance from and were not intimate with the testator: *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 780.

Always must the intent of the testator be determined by the will itself, and that determination is a conclusion of law: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168.

The person or thing which is the matter in doubt being decided upon as a matter of fact, the application of the intent of the will that that person should receive the property, or that the property should go to such a person, presents absolutely no difficulty. For that reason, as has been said, the fact that there still remains to the court the duty of construing the will in this particular is sometimes lost sight of. Thus a will gives a legacy "to my niece, daughter of my sister Jane, in San Francisco." It is disclosed that the testator has a sister Jane, who lives in San Francisco, and who had two nieces. Extrinsic evidence is admitted to show that at the time of the making of the will the sister Jane had but one daughter; that the testator knew this niece; that before the birth of the second niece he departed from the state, was never thereafter in communication with his sister, and did not know of the existence of the second niece. Here the finding of fact would clearly be that the testator had in mind the elder niece. This finding at once removes the only difficulty in the way of construction; but, nevertheless, legally and logically, no matter how simple may be the construction



which follows, there is the necessity of construction in the declaration by the court that the testator by his will did bequeath a legacy to the elder niece. Much more apparent is this legal construction in the second class of cases: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168.

The primary purpose of all rules to be applied in the construction of wills is to ascertain the testator's intention, not some undeclared purpose which may be imagined to have been in his mind, but the intention disclosed by the words he has used. As an aid to the interpretation, resort may be had, in cases of uncertainty, to the circumstances under which the instrument was executed: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

The cardinal rule for the construction of all wills is to ascertain the intention of the testator, and this intention is to be ascertained from the words of his will, taking into view, when necessary or appropriate, the circumstances under which it was made, if there is an uncertainty in its language: *Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774.

The primary purpose of all interpretations of wills is to ascertain the testator's intent, as disclosed by the language he has used. Each case depends upon its own peculiar facts, and precedents have comparatively little value: *Estate of Henderson*, 161 Cal. 354, 119 Pac. 496.

A testator, by one paragraph of his will, gave the entire use of his residuary estate to his wife for the term of her natural life, "except as hereinafter qualified," with remainder upon her death to his son. The following paragraph provided that in the event his wife should marry again the provisions made in the preceding paragraph should immediately cease and terminate, and his estate should be divided, one-third thereof to his wife and two-thirds to his son absolutely and in fee simple. The next paragraph provided that in the event the son should die before the testator without issue the entire estate should go to the wife absolutely and without condition. Held, that the provisions of the will, construed together, did not manifest any intent upon the part of the testator to restrain or discourage marriage by



his widow, but simply postponed any division of the residue between her and his son while she remained unmarried, and gave her during such time the sole use thereof, and that there was nothing in the language of the will creating any prohibited condition imposing a restraint upon marriage: *Estate of Fitzgerald*, 161 Cal. 319, 119 Pac. 96.

Where the intent is plain, the duty of the court is to declare that intent, without regard to the consequences. If the plan adopted by the testator for the disposition of his property can not be given effect because it violates the rules of law, the court is not authorized to substitute for the illegal provision some other which it may suppose would have been adopted by him if he had known that the directions actually given could not be carried out: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. (See page 1568.)

**(2) How ascertained. Parol evidence to explain.** In case of uncertainty arising upon the face of a will, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made: *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926; *Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774.

The intention of a testator is to be ascertained from the language of the will and where the meaning is clear from the words used, a resort to rules of construction is not permissible, but where the meaning of a word or phrase is not clear and may be given one of either two or more meanings when read in the light of the whole instrument, the courts are required to look to the conditions and circumstances surrounding the testator at the time the will was made and in the light of the same his true intention: *In re Pappleton's Estate*, 34 Utah 285, 97 Pac. 141.

The general rule is that parol evidence can not be admitted to supply, or contradict, enlarge, or vary the words of a will, nor to explain the intention of the testator, except in two specified cases: (1) Where there is a latent ambiguity, arising de hors the will as to the person or subject meant to be described, and (2) to rebut a resulting trust: *Siegley v. Simpson*, 73 Wash. 69, 131 Pac. 481.



The court has no power to reform a will so as to conform to the intentions of the testator shown by external evidence to be different from those expressed in the instrument: *Holmes v. Campbell College*, 87 Kan. 597, 125 Pac. 25.

In order to determine a testator's intention testimony is admissible to explain the situation and condition of the property as understood by him when he attempted to make a disposition thereof: *Kerr v. Duvall*, 62 Or. 470, 125 Pac. 831.

In the examination of a manuscript in order to ascertain the intention of a party courts will take into consideration the ability of the person who drew the instrument, correctly to express the terms, objects, and purposes desired: *Love v. Walker*, 59 Or. 95, 115 Pac. 300.

Parol evidence is admissible to identify land devised by ascertaining to what tract the description will apply: *Cummins v. Riordon*, 84 Kan. 791, 115 Pac. 568.

Rules must give way to manifest intent: *In re Murphy's Estate*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. 110.

Whole will may be examined and words interpolated or transposed: *In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492.

Words should be given their usual meanings unless apparently used in a different sense: *Fancher v. Fancher*, 156 Cal. 13, 103 Pac. 206.

Where terms are free from ambiguity, they must be interpreted according to their ordinary meaning and legal import: *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

Words occurring more than once are presumptively used in the same sense: *In re Goetz's Estate*, 13 Cal. App. 266, 109 Pac. 105.

Testator's intention as to meaning of particular words will be given effect: *In re Hite's Estate*, 155 Cal. 436, 101 Pac. 443.



Intent where not sufficiently clear may be ascertained from circumstances surrounding making of will. Civil Code, Sec. 1318: *In re Murphy's Estate*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. 110.

In those cases where extrinsic evidence is permissible there may be a conflict in the extrinsic evidence itself, in which case the determination of that conflict results in a finding of pure fact. But when the facts are thus found, those facts do not solve the difficulty. They still are to be applied to the written direction of the will for the latter's construction, and that construction still remains a construction at law. In such cases, where the evidence of the facts is in conflict, it is permissible for the court, or for the jury, to find the facts; and those findings, under firmly established principles, will not here be disturbed. But the application to the will itself of the facts found, admitted, or established without conflict presents a question of legal construction, which is as purely a question of law as is a construction of the will without resort to extrinsic evidence. Therefore, if the facts have been found by the court upon conflicting evidence, this court, accepting the findings, will still review the construction of the court in probate and determine whether or not a wrong construction at law has been reached: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168.

It is fundamental that in all cases where extrinsic evidence is admissible to aid in expounding the will, the evidence is limited to this single purpose. It is considered for the purpose of explaining and interpreting the language of the will, and is never permitted to show a different object from that disclosed, though, perhaps, obscurely, by the language of the will itself: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168.

In case of uncertainty arising upon the face of a will, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made: *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926. (See page 1568.)



### 3. LAW IN FORCE.

The construction and effect of a devise of real property situated in a jurisdiction other than that of a testator's domicile is to be determined in accordance with the law of the jurisdiction where the land is situated: *Spreckels v. Spreckels*, 21 Haw. 556.

Where a trust to convey real estate created by will is valid according to the law of Hawaii and is operative as to real estate situated in Hawaii, it will not be held ineffective or void so as to cause the property to pass as intestate estate upon the ground that such a trust is not permitted by the law of California, in which state the testator resided and wherein the bulk of his property was situated. In Hawaii such a trust will operate according to the intention of the testator notwithstanding the construction placed upon the will by the California court: *Spreckels v. Spreckels*, 21 Haw. 556.

A will is said to be ambulatory until the death of the testator, and until that event occurs the testamentary disposition is subject to the will of the testator, and likewise to the will of the state as expressed in its public laws. The will speaks as of the date of the testator's death and must conform to the laws in force at that time. While the legislature may not interfere with or divest estates which have already become vested through the death of the testator, its power over wills, the manner of their execution, and the mode of carrying out their provisions is absolute and supreme until death occurs: *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1029.

The rule that the disposition of personal property is governed by the law of the domicile of the owner is applicable only when there is no law to the contrary in the place where the property is situated: *Estate of Lathrop*, 165 Cal. 243, 131 Pac. 752. (See page 1568.)



#### 4. WORDS AND PROVISIONS TO BE GIVEN EFFECT IF POSSIBLE.

Where a will is not effective to dispose of any of the property of the testator, his separate property would have to be regarded and treated by the courts as such, notwithstanding a declaration in the will of the wish of the testator that it should be treated and considered as community property: *Estate of Claiborne*, 158 Cal. 646, 112 Pac. 278.

Although ordinarily the statement of acreage is the least important part of a description of land, it may be controlling when it obviously was the intention of the testator that a specified quantity of land should be devised: *Cummins v. Riordon*, 84 Kan. 791, 115 Pac. 568.

In the absence of anything to suggest the contrary a testator must be understood as asserting that he is the owner of a tract of land which he undertakes to devise, although he does not in terms refer to it as his land or employ any equivalent expression: *Cummins v. Riordon*, 84 Kan. 791, 115 Pac. 568.

All parts of the will should be effectuated and harmonized if possible: *In re Robinson's Estate*, 159 Cal. 608, 115 Pac. 49.

In arriving at intention of testator, the court must consider words of the will itself: *In re Robinson's Estate*, 159 Cal. 608, 115 Pac. 49.

The estate of a deceased person is not a person or entity which can take under a will: *Estate of Glass*, 164 Cal. 765, 130 Pac. 868.

A bequest of the residue of the property of the testatrix to "father Glass' estate," the person whose estate was indicated being alive at the date of the will but having predeceased the testatrix, can not be construed as a bequest to such person if alive, and if not, to his legal heirs, or his devisees or legatees as the case may be: *Estate of Glass*, 164 Cal. 765, 130 Pac. 868. (See page 1569.)



## 5. MEANING OF CERTAIN WORDS.

(1) **In general.** The words of a will are to be taken in their ordinary sense unless a clear intention to use them in some other sense appears. Even technical words are not to be taken in their technical sense if the context clearly indicates a contrary intention: *Estate of Roach*, 159 Cal. 260, 113 Pac. 373.

The primary and ordinary meaning of the terms "legal representatives," "legal personal representatives," "personal representatives," and "representatives" is executors and administrators and in the absence of anything to show a contrary intent they must be so construed: *Murphy v. Tillson*, 64 Or. 558, 130 Pac. 638.

A gift of the income or the rents, issues, and profits of property is to be construed as a gift of the property itself unless from some language in the will it appears that the testator intended something different: *Hapai v. Brown*, 21 Haw. 499; *King v. Hawaiian Trust Co. Ltd.*, Id. 619.

In its legal sense as used in statutes and wills and deeds and other instruments "issue" means descendants, lineal descendants, offspring: *Schafer v. Ballou*, 35 Okla. 169, 128 Pac. 498.

Where one died who had been twice married, leaving a widow, a child by the first marriage, and an estate the greater portion of which had been acquired by the joint industry of the decedent and the second wife, the child by the first wife is "issue" within the meaning of the word as used in the second proviso of Sec. 8985, Comp. Laws of 1909 of Oklahoma, so as to make such child coheir with its stepmother: *Schafer v. Ballou*, 35 Okla. 169, 128 Pac. 498.

A "will" in the ordinary conception of the term as applied to a testament is the formal instrument by which a person disposes of his property to take effect at his death: *In re Pierce's Estate*, 63 Wash. 437, 115 Pac. 837.

"Testament" in provision against contest held to include codicil: *In re Hite's Estate*, 155 Cal. 436, 101 Pac. 443.



“Distributive share” held not used as words of devise so as to show a present vested gift but merely to denote quantum beneficiary was to take if she took at all: *In re Blake’s Estate*, 157 Cal. 448, 108 Pac. 287.

The “residue” is what remains after paying the legacies of the will and the debts and expenses of administration: *McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027, 1028.

The word “divide,” in and of itself, does not import an actual physical segregation into distinct shares. It is, when used in such phrases as “to be divided between,” or “divided in equal shares among,” or the like, very commonly used to express an intention to give interests to persons as tenants in common. So, also, such phrases as “equal parts,” or “equal third parts,” or “third parts,” are entirely appropriate to indicate a tenancy in common: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

The direction in said will to the trustees to “divide said estate into three equal parts” does not require them, as a condition to the vesting of the devises in the respective devisees, either to physically subdivide the various parcels of realty owned by the testator, or to appraise the entire estate, real and personal, and allot various parts of it so as to make three shares of substantially equal value; on the contrary, and especially in view of the fact that the entire estate was community property, an undivided half of which passed to the surviving wife, so that such a physical division or allotment would be impracticable, the direction for a division into three equal parts should be construed as intended to accomplish merely a creation of equal one-third interests in the entire estate and every part thereof—that is to say, tenancies in common—for his two sons and daughter, at the same moment of time, that is, upon the death of his wife: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

The direction to the trustees to divide the estate into interests held in common, and to assign, transfer, set over, and deliver, imposed upon them merely the obligation which would rest upon any trustee, at the termination of his trust, with respect to property which then passed in undivided



interests to two or more persons. It would be his duty to deliver such property to the parties entitled, and to that end to make such division as is involved in the act of turning over an undivided share. Such duties being implied, they may be conferred by the testator without violation of the provisions of sections 847 and 857 of the Civil Code: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

The words of a will are to be taken in their ordinary sense, unless a clear intention to use them in some other sense appears. Even technical words are not to be taken in their technical sense if the context clearly indicates a contrary intention: *Estate of Roach*, 159 Cal. 260, 113 Pac. 373.

While technical words in a will are ordinarily to be taken in their technical sense, they will not be so taken when it appears that they were used in another sense by a testator who drew his will without an acquaintance with the technical sense: *Estate of Henderson*, 161 Cal. 354, 119 Pac. 496.

Comp. Laws 1907, Sec. 2777, providing that technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, is but declaratory of the rule prevailing at common law and is a rule of construction merely: *In re Pappleton's Estate*, 34 Utah 285, 97 Pac. 140.

A bequest in a will of all the testator's "interest in the estate" of a named decedent will be construed to pass not only such interest as vested in him as a beneficiary of such estate, but also such further interests as he may have acquired in the property thereof by succession or bequest from other beneficiaries, where such estate was in process of administration at the time of the death of the testator, and his interests therein constituted the whole of the property left by him: *Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33.

The word "estate" is used in various senses, and one of its most common uses is to denote and describe in the most general manner the property composing the assets of a decedent: *Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33.



Testator devised real estate to his wife and gave to another woman named other described real estate, to be held by her for the support of herself and testator's children by her, and provided that in the event of her "marrying again" the gift to her should become void, and the property should go to such children. A provision in similar language was made in favor of a third woman. The woman so named was testator's polygamous wife. Testator and she were members of the Mormon Church and believed in its doctrines including the doctrine of polygamy. Held that the words "marrying again" included the entering into a polygamous marriage, and the gift to such woman was within Comp. Laws 1907, Sec. 2795, providing that a conditional disposition is one which depends upon the occurrence of some uncertain event by which it is either to take effect or be defeated, and on her entering into a polygamous marriage the gift to her terminated: *In re Pappleton's Estate*, 34 Utah 285, 97 Pac. 141. (See page 1569.)

#### REFERENCES.

Who takes under gift to "husband," "wife," or "widow," see note 83 L. R. A. (N. S.) 816.

(2) **Devise to heirs, etc.** A will after giving a pecuniary legacy to a designated person described by the testator as "my niece," provided in the residuary clause that the residue of his estate should go "to my heirs at law as they are entitled by the laws of inheritance and succession, including my niece above named, to share in this clause." The person so designated as "my niece" was not a niece of the testator, nor one of his heirs at law, but was a niece of his deceased wife. His heirs at law were a surviving sister and the descendants of two deceased sisters and of one deceased brother. Held that the person so designated as the testator's niece was to be considered in the distribution of such residue as one of the testator's heirs at law and was entitled to a one-fifth thereof: *Estate of Robinson*, 159 Cal. 608, 115 Pac. 49.

Legacy to M. described as niece, but who was no blood relation of testator, residue to "my heirs at law including



my niece above named, to share in this clause," held to entitle niece to share in residue as an heir though she was not such: *In re Robinson's Estate*, 159 Cal. 608, 115 Pac. 49.

Held entitled to take as if she were sole child of a deceased brother or sister: *In re Robinson's Estate*, 159 Cal. 608. 115 Pac. 49.

By his last will J. W., deceased, devised his real property as follows: "I give and bequeath to my wife, Emily A. Womersley, all the real estate I die possessed of, wherever located, for her sole and separate use during the period of her natural life, and direct that at her death the said real property be equally divided among the heirs of the Womersley family, share and share alike, my said wife, Emily A. Womersley, to have all the income from said property during her life." There is held here no latent ambiguity to be resolved under section 1340 of the Civil Code. The phrase "the heirs of the W. family," used by the testator undoubtedly requires construction, but, if that phrase contains any uncertainty, it is one which arises upon the face of the will, and is to be construed by taking in view the circumstances under which the will was made, excluding the testator's oral declarations. (Civil Code, Sec. 1318.) Those circumstances disclose that deceased was an Englishman, that he with his brothers and sisters inherited from his father, that the brothers and sisters were those above named, and in the event of his intestacy were (with his widow) his sole heirs at law. There seems to be no difficulty in arriving at the intent of the testator from the words expressed in the will: *In re Womersley's Estate*, 164 Cal. 85, 127 Pac. 645.

Plainly, the words, "heirs of the W. family," mean that the remainder was left to those of his, the W., family, who would be his heirs in the event that he died intestate. This use of the word "heirs" is not strained, but is a common colloquial use, recognized both by lexicographers and law writers: *In re Womersley's Estate*, 164 Cal. 85, 127 Pac. 645.

A will provided that a fund should be placed in the hands of a trustee, the income to be paid to a son of the testator during his life; that on the death of the son, if he left no



issue and the testator's widow was dead, the fund should go to the testator's "surviving heirs"; that if the widow were alive she should have the fund for her life and it should then go to the testator's "surviving heirs"; that if the son left issue, they should have the income for life and at their death the fund should go to the testator's "surviving heirs." Held that the will should be construed as intended to vest the title to the fund in the testator's heirs upon the death of the son, their enjoyment of it to be postponed during the life of the son's issue, and that the rule against perpetuities was not violated: *Salisbury v. Salisbury*, — Kan. —, 141 Pac. 173. (See page 1570.)

#### REFERENCES.

As to whether terms, "child," "children," "issue," etc., in a will include adopted children, see note 27 L. R. A. (N. S.) 1158, 30 L. R. A. (N. S.) 914, 37 L. R. A. (N. S.) 849.

Meaning of term "natural heirs," see note 45 L. R. A. (N. S.) 1163.

Effect of declaring one to be an heir or next of kin, see note 45 L. R. A. (N. S.) 48.

Effect of videlicet following words "heirs" in a devise of real property to restrict estate given to the first taker, see note 33 L. R. A. (N. S.) 191.

### 6. LANGUAGE OF THE WILL.

(1) **Ambiguous and doubtful words.** Where a will discloses a latent ambiguity and uncertainty as to the person whom the testatrix intended to indicate, extrinsic evidence is admissible to explain same: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166.

The rules of construction applied to wills recognize that each will must be construed by its own terms and that where there is any ambiguity in the language the court must so far as possible put itself in the position of the testator, taking into consideration all the circumstances under which the will was executed, the condition of the testator's family and his estate, and from all the facts and circumstances find what his intention was: *Hawkins v. Hansen*, — Kan. —, 139 Pac. 1022.



In a will which purported to dispose of the entire estate of the testator, and which expressly gave to his wife in her own right all of his personal property, there was a separate item as follows: "I will and bequeath to Mina, my wife, all my real estate of whatever kind, lots, houses, or farm property, to have and hold, sell and convey in order to pay and liquidate indebtedness, mortgages, etc., against my estate." Held that this provision operated to devise to the wife an absolute fee in the real estate subject, of course, to the payment of the debts of the testator: *Twist v. Twist*, — Kan. —, 139 Pac. 377. (See page 1571.)

**(2) Precatory words.** A precatory trust is not created by a provision in a will whereby the testatrix gives the residue of her estate to P., the brother of her deceased husband, and then declares: "It has always been my desire and purpose to devote a large part of my property and estate to charitable purposes and uses, and to make such provisions therefor in my will. But under the exigencies of this will I am able to designate the particular charities and benevolences to which I desire to extend my bounty. The said P., however, is fully aware of and understands my desires in this regard, and I have full confidence in him that he will, in his judgment, respect and endeavor to carry out my said wishes and desires. I therefore request of him to do so, so far as he may think proper, without, however, intending by this clause or anything that may be herein stated, to create any trust or to place any limitations upon the said P., residuary legatee, in respect to the said legacy": *Estate of Purchell*, 47 Cal. Dec. 210, 138 Pac. 704.

Precatory words are not to be regarded as creating a trust unless it appears that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed: *Estate of Purchell*, 47 Cal. Dec. 210, 138 Pac. 704.

A separate and independent action in equity would be necessary to develop such a trust rather than an appeal from



a decree of distribution: *Estate of Purchell*, 47 Cal. Dec. 210, 138 Pac. 704.

Precatory words may or may not create a trust, according as they are used and whether, in any particular will, they have been used for this purpose, will depend upon the construction to be given to that will. The question for determination is, whether the devisee or legatee is the beneficiary, or merely is trustee for others, of the gift bestowed upon him; whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion: *Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774. (See page 1572.)

## 7. VAGUE AND UNCERTAIN PROVISIONS.

An indefinite devise of land may be either for life or in fee according to the intention of the testator as gathered from the whole will: *King v. Hawaiian Trust Co. Ltd.*, 21 Haw. 619.

Where a testator does not in terms devise his real estate to any one, but directs his executors to sell it and divide the proceeds among his children, no equitable conversion into personalty results, but each child, upon the death of the testator, becomes the owner of a portion of the real estate, to which the lien of a judgment against such child will attach: *Smith v. Hensen*, 89 Kan. 792, 132 Pac. 997.

If a corporation can be identified by the location of its building, any mistake in or omission of its name will not defeat a testamentary disposition of property to it: *President and Trustees, etc., v. Keene*, 59 Or. 496, 117 Pac. 426.

Upon a question involving the interpretation of part of a will reading "I . . . make the following disposition of my property: . . . Eight thousand dollars to wife, all of which is to be held in trust by J. O. and H. H. Benton without bond—they to pay heirs such rate of interest as shall be agreed



upon, until children become of age—and she remains unmarried—in such case money shall fall to my legal heirs,” held that the words “in such case” are equivalent to “in case she remarries”: *Benton v. Benton*, 78 Kan. 373, 104 Pac. 856.

“In the administration of my estate it is my wish that all property shall be considered and treated as community property. So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes,” held valid disposition to wife of what she would take under law of succession if property was community property: *In re Claiborne's Estate*, 158 Cal. 646, 112 Pac. 278. (See page 1572.)

#### REFERENCES.

Devises or bequests in severalty of undesignated parcels of property to different persons, see note 41 L. R. A. (N. S.) 1049.

Failure to mention or identify the subject matter of a devise or bequest, see note 36 L. R. A. (N. S.) 618.

### 8. CONFLICTING AND INCONSISTENT PROVISIONS.

Where in a will two clauses are found to be in irreconcilable conflict the latter will generally prevail over the earlier unless thereby the manifest intent of the testator gathered from the will as a whole would be defeated: *Hapai v. Brown*, 21 Haw. 499.

Where a will contains repugnant calls in the description of land devised, that call may be rejected which was likely to have least engaged the attention of the testator and in which there was the greatest likelihood of error: *Cummins v. Riordon*, 84 Kan. 791, 115 Pac. 568. (See page 1572.)

### 9. INDEFINITE AND UNCERTAIN DEVISES.

Where a testator failed to specifically provide for the disposition of property in case of the remarriage of his widow, the disposition which he did make applies in that event where such a construction appears to be in accordance with



the testator's purpose as gathered from the entire will: *Klingman v. Gilbert*, 90 Kan. 545, 135 Pac. 683.

Direction for use of certain money for "suitable monument" to testator's memory held to contemplate shaft or other structure over tomb or grave, and not to authorize erection of a free library as a memorial: *Fancher v. Fancher*, 156 Cal. 13, 103 Pac. 206.

Where will set apart specified sum for funeral expenses, interment of testator's body, and a suitable monument, it gave executors discretion in selection of monument as to form, style, and cost, having reference to amount of money set apart: *Fancher v. Fancher*, 156 Cal. 13, 103 Pac. 206.

Remainder to brothers and sisters after deducting portion to which widow, given life estate in all of testator's property, was entitled under laws of state, held to mean one-half of entire community estate and not half of husband's half: *Whalen v. Webster*, 159 Cal. 260, 113 Pac. 373.

Bequest by implication will arise though no direct language supports it where from uniformity of language such reasonable construction can be placed thereon as implies intent to make a bequest: *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

Devise over on death of beneficiary without issue held to imply gift to issue: *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

A bequest of the diamonds of the testatrix for the purpose of raising money for the publication of her revised edition of the Bible is void for uncertainty: *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131. (See page 1573.)

#### 10. DEVISE TO A CLASS.

The will in question made the following bequests: "Fifth: To all employees of the Henry Cowell Lime & Cement Company now working for said firm at Santa Cruz, and who have been in said employ twenty years the sum of \$1000 each and all who have worked over ten years the sum of \$500 each. Sixth: To all employees in the S. F. of said firm who have



worked three years the sum of \$1000 and who have worked two years the sum of \$500 each. In all cases these dates are of January first nineteen hundred and eleven." Held, that the sixth clause was not void for uncertainty as to the class of persons who were to receive the legacy; that the initials "S. F." were intended to designate San Francisco, where the company was engaged in business, and that properly construed the clause referred to persons working in San Francisco in the service of the company in any branch of its business: Estate of Cowell, 47 Cal. Dec. 247, 139 Pac. 84.

In order to come within the class designated in such sixth clause, the person must have been in the employ of the company on January 1, 1911. If his aggregate service was for a sufficient time, it was not necessary that he should have been employed continuously during the entire period of three or two years: Estate of Cowell, 47 Cal. Dec. 247, 139 Pac. 84.

A testator, who died March 18, 1911, by his holographic will dated January 9, 1911, made the following bequests: "Fifth: To all employees of the Henry Cowell Lime & Cement Company now working for said firm at Santa Cruz and who have been in said employ for twenty years the sum of \$1000 and to all who have worked over ten years the sum of \$500 each. Sixth: To all employees in the S. F. of said firm who have worked three years the sum of \$1000 and who have worked two years the sum of \$500 each. In all cases these dates are of January first, nineteen hundred and eleven." Held, that the benefits conferred by the fifth paragraph were limited to persons who were employees of the company on January 1, 1911, and that to entitle them thereto it was not necessary that they should have been employed continuously for twenty and ten years respectively: Estate of Cowell, 47 Cal. Dec. 243, 139 Pac. 82.

A person engaged in cutting wood for the company on its property, at a specified price per cord, and who worked exclusively for the company, under the supervision of its agent, cutting where he was told to cut, and devoting all his time to such work, was an employee of the company within the meaning of that term as used in the will: Estate of Cowell, 47 Cal. Dec. 243, 139 Pac. 82.



Where a testator gave his wife a life estate in real property and directed that after her death the property should be equally divided "among the heirs of the Womersley family," the widow of a deceased brother would not be entitled to participate: *Estate of Womersley*, 164 Cal. 85.

Where residuary estate was directed to be converted into cash and paid out to fourteen different legatees in specified percentages, such legatees do not constitute a class, and in the event of the death of any of them their shares go to the heirs at law of the testatrix: *Estate of Kunkler*, 163 Cal. 797, 127 Pac. 43.

Where a will makes a gift to a class, the death of one of the class prior to the death of the testator does not have the effect of causing the legacy to lapse, but those of the class who survive the testator take the whole legacy: *Estate of Murphy*, 157 Cal. 63, 106 Pac. 230, 37 Am. St. 110.

In legal contemplation a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number. Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class. *Peck v. Peck*, — Wash. —, 137 Pac. 139.

The members of a class are to be ascertained at the death of a testator in case of a gift to his heirs, unless a contrary intention clearly appears from the will: *Klingman v. Gilbert*, 90 Kan. 545, 135 Pac. 684.

Gift to a class is gift of aggregate sum to a body of persons uncertain in number at time of gift, to be ascertained in futuro, who are all to take in equal or other definite proportions, share of each being dependent as to amount upon ultimate number: *In re Murphy's Estate*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. 110.



Where gift is to devisee's nomination and particular share of each is mentioned, devise is to individuals as tenants in common, and not to class and if words which alone would create class gift are followed by equally operative words of devise to devisees by name, and in definite proportions, law infers individual taking: *In re Murphy's Estate*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. 110.

Gift held individual to four children named resulting in intestacy as to share of one dying before testator: *In re Murphy's Estate*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. 110.

A will, after making various pecuniary bequests and specific dispositions of both real and personal property, gave certain land and specific personal property to the testator's wife, and in the residuary clause, by separate individual provisions, disposed of the residue of the estate, which consisted of both real and personal property, in undivided one-quarter shares to his wife and three children. After so disposing of the residue the will provided that "should any of the legatees herein provided for die before my death, then the legacy provided for him or her shall be divided equally among the residuary legatees." Held, that upon the death of the wife prior to that of the testator, the property, whether real or personal, that would have passed to her under the will had she survived, including what would have passed under the residuary clause, did not lapse, but passed under the gift over to the three surviving residuary legatees. The gift over contained in such substitutionary clause is to the residuary legatees as a class: *Estate of Henderson*, 161 Cal. 354, 119 Pac. 496.

In legal contemplation a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number: *Estate of Henderson*, 161 Cal. 354, 119 Pac. 496.

In seeking to ascertain whether a gift is to a class, the paramount consideration is the intent of the testator, as de-



rived from the entire instrument. To this apparent intent, rules of construction must always yield. In such will the substitutionary clause, including the gifts over the residue itself, was added for the very purpose of preventing intestacy as to any part of the estate: *Estate of Henderson*, 161 Cal. 354, 119 Pac. 496. (See page 1573.)

#### REFERENCES.

Gift to persons not designated by name but by general description and as being living at a certain time prior to testator's decease, as a gift to individuals or a class, see note 34 L. R. A. (N. S.) 945.

Time for ascertaining member of class described as testator's "heirs," "next of kin," "relatives," etc., to whom an estate in real or personal property is limited by way of remainder or executory gift, see note 33 L. R. A. (N. S.) 1.

#### 11. CLEAR DEVISE WHEN NOT CUT DOWN.

Where one part of a will clearly indicates a disposition in the testator to create an estate in fee, it will not be restricted or cut down to any less estate by subsequent vague or doubtful expressions: *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87.

Clause explaining that testator made no money bequests to appellants because realty devised to them was sufficient, held not to exclude appellants from sharing under clause giving any surplus money to the legatees equally: *In re Goetz's Estate*, 13 Cal. App. 266, 109 Pac. 105.

Civil Code, Sec. 1322, declaring that clear and distinct bequests shall not be affected by words not equally clear, held not applicable to destroy effect of clause providing for lapse should any legatee die before testator: *In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492.

Civil Code, Sec. 1322, that clear and distinct bequests shall not be affected by words not equally clear and distinct, held not applicable: *In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492.

Words subsequently used, which merely raise a doubt or suggest an inference, will not be construed as limiting or



cutting down an absolute estate conveyed by one clause of a will: *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131.

The rule embodied in section 1322 of the Civil Code that "a clear and distinct devise or bequest can not be affected . . . by any other words not equally clear and distinct," like other rules of interpretation, is designed to aid in arriving at the intention of the testator as expressed in his will, and must yield to that intention when it appears with reasonable clearness from the words used: *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926. (See page 1573.)

## 12. DEVISES TO WITNESSES.

An attesting witness to a will can not be a beneficiary thereunder and as to such witness the devise is void: *Christiansen v. Talmage*, — Or. —, 138 Pac. 453.

The statute of Kansas (Gen. Stats. 1909, Sec. 9786), making void a devise or bequest to a witness to a will which can not be proved without his testimony applies only to attesting witnesses, not to other persons called upon to testify when the will is offered for probate: *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 136 Am. St. 110. (See page 1573.)

## 13. INVALID PARTS IN WILL.

A testator devised property to his sons, "the heirs and assigns forever"; then by a subsequent clause in his will, he declared "that neither of my sons shall during their lifetime dispose of said interest to any person without the consent in writing of the other two first being had and obtained." Held that the attempted restraint by the testator is void and the devisees acquired the absolute title to the property with the right and power to dispose of it at will: *Lucas v. Lucas*, 20 Haw. 433.

The general rule is that where certain items in a will are valid and others are invalid, unless the valid portions are so inseparably connected with the other parts of the will that if stricken therefrom the general scheme of the testator will be defeated, the will as a whole should not be considered



void: *Chillcot v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. 487; *John v. Preston*, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564; *Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. 814; *Miller v. Weston*, — Colo. App. —, 138 Pac. 431.

If a portion of a will may ever be set aside for want of testamentary capacity, while the rest is upheld, it can only be where the testator, being able to transact business generally, and capable of disposing of his property in other respects, is unable by reason of some specific delusion or mental defect, to comprehend the effect of the provisions in question: *Holmes v. Campbell College*, 87 Kan. 597, 125 Pac. 25.

An interest in real estate, attempted to be conveyed by a void devise in a will descends to the person or persons who would have been entitled to such interest had no will been made: *Kinne v. Phares*, 79 Kan. 366, 100 Pac. 287.

Under section 857 of the Civil Code, a devise of real estate to trustees in trust to convey to persons named is void, where the instrument discloses an intent that the ultimate beneficiaries shall take only through a conveyance by the trustees, and that no estate or interest, other than a right to enforce the performance of the trust, is given to them: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

Where a will contains, in addition to words which, standing alone, would be deemed to create a trust to convey, some expression which might be operative to pass the title directly from the testator to the beneficiary, the will should be construed as making a direct devise, and such devise will be given effect, in disregard of the words importing an invalid trust, and it makes no material difference that the direction for transfer is followed, instead of preceded, by the words indicating an intent to make a direct devise: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

When words which by themselves import an unlawful trust to convey are joined with other words which are suffi-



cient to operate as a direct devise of the interest, the direct devise is not destroyed by the fact that the testator may have attempted to provide in addition for an unlawful method of passing title. In such case the provision for a conveyance is to be regarded as unnecessary, except, perhaps, as convenient and additional evidence of title: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371. (See page 1574.)

#### 14. RULE FAVORING TESTACY.

In the absence of a definite provision to the contrary it is presumed that a testator intended to dispose of the whole of his estate: *Singer v. Taylor*, 90 Kan. 285, 133 Pac. 843.

It is presumed testator intended to dispose of entire estate: *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

Presumption against intestacy is subject to cardinal rule requiring construction according to the intention of testator: *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287.

Especially where intention to dispose of whole estate is evinced: *In re Gregory's Estate*, 12 Cal. App. 309, 107 Pac. 566.

Rule against intestacy can not be invoked to defeat plain rules of law declaring when gift is individual: *In re Murphy's Estate*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. 110.

It is presumed that a testator intended to dispose of all his property by his will and a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction: *Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33.

Where a will may reasonably be interpreted in two ways, one of which results in intestacy while the other leads to an effective testamentary disposition, the interpretation which will prevent intestacy is to be preferred: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

The testator by his will left all his estate which was subject to his testamentary disposition, the same being entirely community property and consisting of both realty and per-



sonalty, to trustees in trust (1), "to pay over the net annual income thereof to his wife during the term of her natural life"; (2), upon her death, "to divide said estate into three equal parts, when one of said parts shall be forthwith assigned, transferred, set over and delivered by my said trustees" to each of two of his sons, "and the same shall be and become his absolutely and forever"; (3) "to pay over the net annual income derived from the remaining equal third part to his daughter during her natural life, and upon the death of said daughter, to pay over the principal of said one-third part, with all accumulations of the income therefrom, to her children then living, and so that each child shall receive an equal share thereof, and the same shall become his or hers absolutely and forever." The will further provided that children of deceased children of said daughter should take the share which the parent would have taken had he or she survived said daughter, "and the same shall be divided between said children share and share alike," and that upon the death of said daughter without child, children or grandchildren her surviving, the trustees should pay over the principal of said one-third part, with all accumulations of income therefrom, to his aforesaid sons, share and share alike, "and the same shall become theirs absolutely and forever." It further provided, that if either of his said sons should not be living at the time of his death or at the time of his wife's death, then all the legacies and devises given to him should go to his lawful issue, share and share alike, "and the same shall be and become theirs absolutely and forever." The trustees were empowered to invest and reinvest the trust estate, and to sell any portion thereof, at their discretion. Held, that the will did not create a trust to convey, partition, or make allotments of real estate, which would be invalid under sections 847 and 857 of the Civil Code, but, properly construed, made direct devises of legal estates to the beneficiaries as tenants in common: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

The rule that favors testacy as against intestacy operates only where the existence of the testamentary intent is ascertained and the subject matter of doubt is one of construc-



tion. Where there is a doubt as to the existence of the animus testandi, the rule is not applicable: *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96. (See page 1574.)

### 15. PARTIAL INTESTACY.

Where the court was called upon judicially to construe a will upon the settlement of a trust created thereunder, and construed it as involving a partial intestacy, under a devise to a granddaughter, who died leaving issue, before she had become entitled to any distribution of the corpus of the estate, such construction of the will involves pure conclusions of law, and heirs who had received their full share of the corpus of the estate willed to them, and an additional share by reason of the partial intestacy so declared, are not protected on appeal merely on the ground of a finding of facts in their favor not assailed in a bill of exceptions: *Estate of Blake*, 157 Cal. 448, 108 Pac. 287. (See page 1574.)

### REFERENCES.

The presumption against partial intestacy is treated in a note to *Lavender v. Rosenheim*, 132 Am. St. 427.

### 16. PERPETUITIES.

The rule against perpetuities which prohibits the suspension of the fee to real estate or of the vesting of title to personalty, for a longer period than that of designated lives in being at the time of the death of the testator, and twenty-one years and nine months thereafter, is not violated by a provision in the will as follows: "I hereby constitute William E. Weston and L. S. Smith of Fairplay, Colorado, and either of them should the other be dead or refuse to act, executors of this my will and trustees of my property, real and personal, and all right and credits, to whom, on the admission of this will to probate, the title rights and ownership of my said property rights and credits shall go, etc'": *Miller v. Weston*, — Colo. App. —, 138 Pac. 429.

The rule against perpetuities requiring that future interests within its scope should vest within twenty-one years,



exclusive of period of gestation, after a life or lives in being, it is not enough that the future interest may or in all probability, will, vest within the limits. It must necessarily so vest: *Klingman v. Gilbert*, 90 Kan. 545, 135 Pac. 683.

The fact that the right of a minor to receive real property and the accumulated income is dependent upon the contingency of his attaining the age of majority, and that under the other provisions of the deed as to the devolution of the property upon the termination of the trust by his death before his majority, such accumulations, if any, will become the property of others who are not minors, and who are persons in whose favor a direction to accumulate would not be valid, is immaterial: *Hornung v. Sedgwick*, 164 Cal. 629, 130 Pac. 212.

Where a trust is created by deed by which the trustee was to manage the property and provide for the education and maintenance of a minor beneficiary; that upon attaining his majority, the minor was to have absolutely the property described; that in case such minor should die before reaching majority, then such property to go to other named grantees—such trust is valid under sections 724, 852, 857, Civil Code: *Hornung v. Sedgwick*, 164 Cal. 629, 130 Pac. 212. (See page 1575.)

## 17. CHARITABLE BEQUESTS.

(1) **In general.** A bequest to the city of Sacramento, Cal., as a memorial to the husband of the testatrix, of the sum of \$30,000 for the erection of a suitable fountain for the benefit of thirsty animals is a gift to a charitable use: *Estate of Coleman*, 167 Cal. 241, 138 Pac. 992.

A bequest to the public library of the city of Stockton, made by a will executed within thirty days of the death of the testatrix is invalid, as a charitable gift under section 1313 of the Civil Code: *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131.

A bequest of one-half of the income of certain property to an incorporated association known as "Christ Doctrine



Revealed and Astronomical Science Association," made by will executed within thirty days of the death of the testatrix, is void, under the provisions of section 1313 of the Civil Code: *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131.

Under section 1285, as amended in 1905, and section 1313 of the Civil Code, provisions in a will of a nonresident testator, collectively disposing of more than one-third of his estate to charity, although valid according to the law of his domicile, operate to pass title to only one-third of his personal property in the state of California: *Estate of Lathrop*, 165 Cal. 243.

A will in order to create a charitable trust in perpetuity must be confined in its application to charitable uses only: *Estate of Sutro*, 155 Cal. 727, 102 Pac. 920.

In the will of Bernice Puahi Bishop the direction to the trustees "to devote a portion of each year's income to the support and education of orphans and others in indigent circumstances" refers to support and education at the Kamehameha School only, and not to support independently of education: *Smith v. Lindsay*, 20 Haw. 330.

A charitable gift in a foreign will of personal property in this state is governed by the same rules as are like bequests in domestic wills; and if the bequest is in excess of one-third of the estate, the domiciliary executors are not entitled to have the whole estate distributed to them: *Estate of Lathrop*, 165 Cal. 243, 131 Pac. 752.

Where a testator devises to charitable purposes the proceeds of certain real estate, it is only the net proceeds, after deducting the expenses of effecting its sale, which can be so distributed: *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242.

The expression "one-third of the estate of a testator," as used in section 1313 of the Civil Code, limiting charitable bequests or devises to that amount, means one-third of the entire distributable estate of the testator wherever located; it does not mean one-third of the estate distributable alone in this state: *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242.



Where a testatrix died domiciled without this state, leaving to trustees for charitable purposes the whole of that portion of her estate which was subject to administration under the laws of this state, the trustees are entitled to the distribution of the whole thereof if its value, together with the value of the estate distributable elsewhere to charity, did not exceed one-third of the entire distributable estate of the testatrix wherever located: *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242.

There is no limitation under the laws of this state, except as prescribed by section 1313 of the Civil Code, upon the right of a person to dispose of his property in favor of charitable purposes: *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242.

Under the law of the state of California it is only one-third of the distributable assets of the estate of a testator, after payment of debts and charges of administration, which can be distributed to charity: *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242.

Section 1313 of the Civil Code was not enacted for the public good or as a matter of state policy, but for the benefit exclusively of the heirs at law, and as a protection against hasty and improvident gifts to charity by a testator of his entire estate to the exclusion of those who in the judgment of the legislature had a better claim to his bounty: *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242. (See page 1575.)

#### REFERENCES.

As to what is a charity or charitable use, see notes in 63 Am. St. 248, Ann. Cas. 1912D 58, Ann. Cas. 1912A 1187.

As to applicability of statutes relating to charitable bequests or devises to precatory gifts for charitable purposes, see note 22 L. R. A. (N. S.) 1262.

**(2) Favored by courts.** Charitable trusts are highly favored and a liberal construction will be adopted in order to render them effectual. Such trusts are not within the rule against perpetuities, nor are they affected by, or within the scope of statutory or constitutional provisions against perpetuities in general. Such trusts are distinguished from an



ordinary trust by the uncertainty of their beneficiaries. Such uncertainty does not cause a charitable trust to fail. The names of the beneficiaries need not be mentioned in the will creating the trust. If the language used indicates with reasonable certainty the objects of the testator's bounty, it is sufficient. Charitable trusts do not fail for want of trustees. The legal estate in such a case is regarded as in abeyance or as vested in the heirs of executors of the donor for the use of the beneficiary or the court will appoint a trustee to carry out the charitable purposes of the testator: *Hagan v. Sacrison*, 19 N. Dak. 173.

Dispositions to charity are looked upon with favor and the courts will uphold all such gifts, whether made by a donor in his lifetime or by a testator, when it can be done consistently with the rules of law: *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242. (See page 1576.)

#### 18. PRETERMITTED CHILDREN.

Construing the provisions of section 5119, Revised Codes of North Dakota, 1905, which provide that "when any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section," it is held that the fact that the lawful issue of a testator is omitted from his will merely raises a *prima facie* presumption that such issue was not intentionally omitted, and that such presumption is rebuttable by extrinsic proof: *Schultz v. Schultz*, 19 N. Dak. 690.

Under the statute of the state of Washington (Rem. & Bal. Code, Sec. 1326) which provides that if any person make his last will and die leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after



the making thereof, or the death of the testator, every such testator, so far as he shall regard such children or their descendants not provided for, shall be deemed to die intestate, and the naming of the children as a class whether for the purpose of providing for them or for the purpose of disinheritance, when coupled with language conveying either intention, is such naming as to show that no child has been intentionally overlooked, to avoid which contingency was the sole purpose of the statute: *Gehlen v. Gehlen*, — Wash. —, 137 Pac. 313, 315, overruling all former decisions which might be construed as holding the contrary.

Evidence dehors the will is admissible to show whether the omission of a child from a will was intentional or not: *In re Peterson's Estate*, — Mont. —, 140 Pac. 239. (See page 1577.)

#### 19. AFTER-BORN CHILDREN.

Where a testator gave his children a pecuniary legacy and devised all his real estate to his wife and there was a child born to him after the making of the will, under the laws of Washington the widow can not give such a marketable title to the land as an unwilling purchaser can be required to accept, inasmuch as the subsequent born child would be entitled to its interest in the property: *Moore v. Elliott*, — Wash. —, 136 Pac. 849.

The statute (Rem. & Bal. Code, Sec. 1326) of the state of Washington as to pretermission of children provides that as to such child the testator shall be deemed to have died intestate, and provides for contribution of the devisees and legatees under the will to make up the share of such child as an heir: *In re Hoscheid's Estate*, — Wash. —, 139 Pac. 66. (See page 1579.)

#### 20. ADOPTED CHILDREN. (See page 1579.)

#### 21. RESTRICTION ON ALIENATION.

Allowing for a period of gestation, the will effects no undue suspension of the power of alienation upon the death



of the testator's widow. As the direct devises, vesting at the death either of the testator's widow or of his daughter, are given to all of the ultimate beneficiaries, the fact that among the takers there may be a child en ventre sa mere does not effect an undue suspension of the power of alienation: Estate of Spreckels, 162 Cal. 559, 123 Pac. 371.



## CHAPTER III.

GENERAL PROVISIONS RELATING TO LEGACIES AND WILLS.  
PROPERTY PASSING BY WILL. VESTING OF INTEREST.

1. Of devises and bequests.
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  - (3) Common law distinctions abrogated.
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  - (5) Substitution of land for legacy. Election.
  - (6) Executor may purchase legacy.
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2. General legacies.
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  - (11) Forfeiture of legacies.
21. Estates tail in Kansas.

## 1. OF DEVISES AND BEQUESTS.

(1) **In general.** The interest of a devisee in real estate is subject to attachment although the will directs the executor to sell the property and distribute the proceeds among the devisees: *Ward v. Benner*, 89 Kan. 369, 131 Pac. 609.

The title of a mortgagor's nonresident heir is not divested by a foreclosure and sale in a suit brought by the mortgagee and defended by the administrator of the mortgagor: *Phillips v. Thompson*, 73 Wash. 78, 131 Pac. 463. (See page 1589.)

## REFERENCES.

**Effect of meretricious relations between testator and beneficiary on validity of devise or bequest**, see note 17 L. R. A. (N. S.) 476-481.

**Power of disposition bestowed on devisee as indicative of quantum of estate intended to be devised**, 18 L. R. A. (N. S.) 463-471.

**Devise or bequest of property in which testator had but a part interest as putting co-owner who is a beneficiary to his election**, see note 30 L. R. A. (N. S.) 644.



As to whether beneficiary may be put to his election by extrinsic evidence of testator's intention, see note 28 L. R. A. (N. S.) 657.

- (2) **Certain words mean what.** (See page 1590.)
- (3) **Common law distinctions abrogated.** (See page 1591.)
- (4) **Particular description as a limitation.** (See page 1591.)
- (5) **Substitution of land for legacy. Election.** (See page 1591.)
- (6) **Executor may purchase legacy.** (See page 1591.)
- (7) **Shares of stock appurtenant to lands.** (See page 1592.)
- (8) **Devise to unnamed heirs.** (See page 1592.)

## 2. GENERAL LEGACIES.

The question whether a testamentary gift is specific or general is determined by the same tests where the property is real as where it is personal property: *Estate of De Bernal*, 165 Cal. 223, 131 Pac. 375. (See page 1592.)

## 3. SPECIFIC LEGACIES. (See page 1592.)

(1) **In general.** Where the will directed the executors "to proceed to obtain the sum of \$5000" from the share of testatrix in her father's estate "and place it in the care of the Methodist Episcopal conference," which was to be pledged "never to use said \$5000" except as an endowment fund for a school for Methodist ministers, it was held that such bequest constituted a specific legacy and was adeemed by the receipt of the share long prior to the death of the testatrix: *Estate of Goodfellow*, 166 Cal. 409, 137 Pac. 12.

The question whether a testamentary gift is specific or general is to be determined by the same tests whether the subject of the gift is real or personal property: *Estate of de Bernal*, 165 Cal. 223, 131 Pac. 375.



The validity or invalidity of specific devises or bequests can not be considered on the application for probate of a will. Such questions are to be tried and determined by appropriate proceedings after the will has been admitted to probate: *In re Hobbins' Estate*, 41 Mont. 391, 108 Pac. 9.

A direction in a will to the executors "to proceed to obtain the sum of five thousand dollars from" the share of the testatrix in the estate of her deceased father, "and place it in the care of the Methodist Episcopal conference, said conference being pledged never to use said five thousand dollars except as part of an endowment fund for a school for methodist ministers," constitutes a specific legacy: *Estate of Goodfellow (McKee v. California Annual Conference of M. E. Church)*, 166 Cal. 409, 137 Pac. 12.

The net rents and profits of real property specifically devised, accruing after the death of the decedent, are a part of such realty, and, if there is sufficient other property primarily liable for the debts and expenses of administration, should be awarded to the devisees: *Estate of De Bernal*, 165 Cal. 223, 131 Pac. 375.

A devise to grandchildren, share and share alike, of five acres in a tract of twenty-five acres, in which the testatrix owned an undivided three-fourths interest, is a specific gift, and entitled to exemption from debts and expenses of administration under section 1563 of the Code of Civil Procedure: *Estate of De Bernal*, 165 Cal. 223, 131 Pac. 375.

Where personal property specifically bequeathed is destroyed by fire during the progress of administration the insurance money collected on account of the loss belongs to the legatee: *Estate of Robb*, 163 Cal. 801, 127 Pac. 55.

**(2) Cum onere.** The acceptance by a devisee of property given to him by the will, charged with a payment therefrom of a certain sum of money, imposes upon the devisee a personal liability for the payment as directed by the will. As soon as the liability accrued, if it was not performed within a reasonable time, the beneficiary became entitled to bring an action to recover the money of the devisee, and to



have his claim declared a lien on the property devised: *Keir v. Keir*, 155 Cal. 96, 99 Pac. 487.

#### REFERENCES.

Mode and effect of renouncing benefit under will, see note 19 L. R. A. (N. S.) 595-597.

#### 4. DEMONSTRATIVE AND CUMULATIVE LEGACIES.

The fact that by a subsequent clause of the will legacies aggregating \$1500 were charged upon the proceeds of the property devised, payable at the death of the wife does not compel the conclusion that the testator supposed that his son William, if he were living, would then have an indefeasible fee and that he must have intended that result: *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926.

A devise to grandchildren, share and share alike, of five acres in a tract of twenty-five acres in which the testatrix owned an undivided three-fourths interest, constitutes a gift of an undivided interest of full five acres rather than simply an undivided three-fourths of five acres: *Estate of De Bernal*, 165 Cal. 223, 131 Pac. 375. (See page 1593.)

#### 4a. ADDITIONAL OR SUBSTITUTIONAL LEGACIES.

It has become well established that additional or substitutional legacies given by a codicil are held to be attended by the same incidents and conditions as were the legacies given originally by the will: *Estate of Cross*, 163 Cal. 778, 127 Pac. 70.

#### REFERENCES.

The subject of specific demonstrative and general bequests is treated copiously in the note to *Kearns v. Kearns*, 140 Am. St. 577-614.

#### 5. LIFE ESTATES.

(1) **In general.** Under a will given to testatrix's husband land, with provision that if he does not survive her then she gives it to her brother, and provision that if the



husband survives her he have and hold the property during his life and at his death to devise it to her brother, the husband takes a life estate with remainder to the brother: *Rooney v. Hurlbut*, 79 Kan. 231, 98 Pac. 765.

No "trust" created by will giving a fund to husband for life remainder over in any unused portion, within Code Civ. Proc., Sec. 1699, providing for settlement of accounts of trustee by probate court: *Hardy v. Mayhew*, 158 Cal. 95, 110 Pac. 113, 139 Am. St. 73.

Upon the death of a life tenant, the property as to which the life estate existed forms no part of his estate and his personal representatives have no right to it in their representative capacity. If such representatives wrongfully takes possession of it, an action for its recovery should be brought against them as individuals: *Luscomb v. Fintzelberg*, 162 Cal. 433, 123 Pac. 247. (See page 1594.)

#### REFERENCES.

Apportionment of income upon death of life beneficiary between distributive periods, see note 27 L. R. A. (N. S.) 449.

**(2) Life tenant purchasing outstanding title.** Where a testator devised all his property to his wife for life and then made several specific devises to his children and finally made them his residuary devisees, after the estate had been finally settled and the executors discharged, all the children joined in a warranty deed of the property to the widow. Held, that if the children did not acquire the fee in remainder under the will they did so under the statute of distributions as intestate property and consequently the deed vested the fee in the widow: *Whitney v. Whitney*, 61 Or. 314, 122 Pac. 290. (See page 1594.)

**(3) Power of devisee to sell.** Where by the terms of the decree the estate of the first taker of the property distributed is expressly defined to be a life estate, with a power of disposition annexed, to be exercised for a specific purpose only, with a limitation over, the power of disposition does not enlarge the life estate into a fee or an absolute right of property, and the limitation over is good. This rule applies



to dispositions of real as well as personal property: *Luscomb v. Fintzelberg*, 162 Cal. 433, 123 Pac. 247. (See page 1595.)

#### REFERENCES.

As to devise or bequest for life with power of disposal, see note to *Hardy v. Mayhew*, 139 Am. St. 82-120.

Power to create remainder after life estate with absolute power of disposal, see note 39 L. R. A. (N. S.) 805.

**(4) Rule in Shelley's case abrogated in Idaho.** Under the provisions of section 3076 of the Revised Codes of Idaho the common law rule, generally known as the "Rule in Shelley's Case," has been abrogated and the term "heirs" has been changed from a word of limitation to one of purchase: *Wilson v. Linder*, 18 Ida. 438, 110 Pac. 274, 138 Am. St. 213.

#### REFERENCES.

The rule in Shelley's Case, see note 29 L. R. A. (N. S.) 963.

### 6. RESIDUARY LEGACIES.

**(1) In general.** While the extent of the residuary estate can not be definitely ascertained until the final accounting of the executor, it vests in the residuary legatee at the instant of the death of the testator: *Estate of Hite*, 159 Cal. 392, 113 Pac. 1072. (See page 1595.)

**(2) Intestacy as to residuum.** (See page 1595.)

**(3) Residuary devise of life estate.** (See page 1596.)

**(4) Where life estate is specifically bequeathed.** (See page 1597.)

**(5) Residuum of lands under undelivered deeds.** (See page 1597.)

**(6) Gift when payable out of residuum.** Under a will distributing \$180,000 in money legacies and expressly excluding any share therein by specific devisees and legatees of all the testator's land, pictures, jewelry, and furniture,



declaring that he made "no money bequests" to them as the real estate "so bequeathed to them in equal shares is ample and sufficient," but in a final bequest of any possible "surplus money that may be left," the will states that it shall be divided equally among "the legatees herein mentioned share and share alike," the specific devisees and legatees are entitled to share pro rata in such surplus: *Estate of Goetz*, 13 Cal. App. 266, 109 Pac. 105.

Where a will of a testatrix, after providing for the payment of certain special pecuniary legacies, directed that all her real estate, with a specified exception, should be sold by her executors to the best advantage, and, after the payment of such legacies, which were expressly charged upon the real estate so to be sold, bequeathed "all the rest and residue of the proceeds of said real estate so to be sold" to certain persons named, as trustees in trust, to found and maintain a home for aged and infirm men, and, by a residuary clause, bequeathed the remainder of her estate to her husband, the only proceeds of her real property passing to such trustees were proceeds of such real property as she owned at her death and which her executors were empowered to sell. The proceeds of a portion of her real estate, sold by her in her lifetime under a contract for its sale which had become executed before her death, and which proceeds were collected by her executors after her death, did not pass to such trustees, but passed under the residuary clause. There is nothing in the provisions of sections 1301 and 1303 of the Civil Code militating against such a construction: *Estate of Dwyer*, 159 Cal. 664, 115 Pac. 235. (See page 1597.)

## 7. PAYMENT OF LEGACIES. INTEREST.

(1) **Payment of legacies.** (See page 1597.)

(2) **Interest.** A legacy is due and payable only after it has been judicially determined by the court having the estate in charge, that there are sufficient assets to satisfy all legacies and demands against the estate and an order for payment has been made. A specific pecuniary legacy does not begin to carry interest after the expiration of one year from



probate of will: *Cobb v. Stratton's Estate*, — Colo. —, 138 Pac. 37. (See page 1598.)

#### REFERENCES.

Remedies for enforcement of legacy when charged upon devise, see note 30 L. R. A. (N. S.) 815.

(3) **Bond of legatee.** (See page 1599.)

### 8. ADEPTION AND ABATEMENT.

A devise to a widow will be abated in favor of a child born after the date of the will where no intention to disinherit appears, in accordance with the provisions of section 4659, Mills Ann. Stats. of Colorado: *Lowrey v. Harlow*, 22 Colo. App. 73, 123 Pac. 147.

A grantor's heir is barred by an unrecorded deed, heirs not being within the class exempted from the effect of such a deed: *Hallett v. Alexander*, 50 Colo. 37, 114 Pac. 493.

If a testatrix, long prior to her death, receives and disposes of her share in her father's estate, such legacy is adeemed: *Estate of Goodfellow* (*McKee v. California Annual Conference of M. E. Church*), 166 Cal. 409, 137 Pac. 12.

Ademption is merely one of the ways in which a legacy lapses. Ademption of a specific legacy is the extinction or withdrawal of it in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the will, which prevents its passing by the will, from which an intention that the legacy should fail is presumed: *Estate of Goodfellow* (*McKee v. California Annual Conference of M. E. Church*), 166 Cal. 409, 137 Pac. 12. (See page 1599.)

#### REFERENCES.

As to ademption of legacies, see note in 95 Am. St. 342.



## 8a. ADVANCEMENTS.

The common law rule that one who has received property by way of advancement must bring it into hotchpotch, if he wishes to claim a portion of the estate of an intestate as an heir, is abolished by the Kansas statute which provides in substance that advancements shall be considered as part of the estate, but that one who has received an advancement in excess of his share need not refund any part of it: *Burns v. Burns*, 87 Kan. 19, 123 Pac. 721.

Unless there is anything in the will to the contrary advancements will be deducted from the shares of residuary legatees and divided among those who have not received advances so that on final division the shares of all will be equal: *In re Pickard's Estate*, — Utah —, 129 Pac. 356.

Where a testatrix expressly declares in her will that one of her sons has already received property by way of advancement amounting to more than his share of the estate, and that therefore she leaves him nothing, the death of one of the other of her four sons mentioned in the residuary clause of the will subsequent to the execution thereof and prior to the execution of a codicil thereto, does not entitle the former to participate in the estate, the codicil expressly confirming the will without rewriting it both as to dispositions of property made thereby and as to advancements mentioned therein: *Estate of Hayne*, 165 Cal. 568, 133 Pac. 277.

No special form, nor even the signature of the decedent is required to constitute a charge of the advancement in writing to an heir of his portion of an estate. It is sufficient if it appears that the writing was done by the decedent and shows the intent to charge the money or property given, as an advancement, rather than as a gift or loan: *Estate of Hayne*, 165 Cal. 568, 133 Pac. 277.

The rule that it is the intention of the decedent at the time the property is transferred to the heir apparent that determines whether it is an advancement or a gift, and that if it was then transferred and vested as a gift, a sub-



sequent written declaration by the decedent, no part of the *res gestae* of the transaction, that it constituted or should be taken as an advancement, is of no force, and is incompetent as evidence that it was an advancement, is subject to the qualification that if the subsequent declaration is contained in a legally executed and probated will, it is competent evidence of the advancement and must prevail: *Estate of Hayne*, 165 Cal. 568, 133 Pac. 277.

The statement in a will that an heir has received property, by way of advancement, amounting to more than his share of the estate, is a sufficient charge in writing to constitute legal evidence of an advancement under the provisions of sections 1396 and 1397 of the Civil Code: *Estate of Hayne*, 165 Cal. 568, 133 Pac. 277.

The statement in a will that an heir has received property by way of advancement amounting to more than his share of the estate is not affected by the death of one of the heirs mentioned in the will subsequent to the execution thereof, where in a codicil made after such death the provisions of the will respecting advancements are expressly confirmed: *Estate of Hayne*, 165 Cal. 568, 133 Pac. 277.

The rule that statutory provisions regarding advancements apply only where the decedent died wholly intestate is not in force in this state: *Estate of Hayne*, 165 Cal. 568, 133 Pac. 277.

The general rule that advancements made before a will was executed can not be considered in making distribution of the estate has no place where the terms of the will itself show the contrary, and particularly where it expressly declares a full advancement has been made, and it appears that the testatrix in making the declaration had in mind her entire estate, and the shares of each heir therein under the law of descent, and that the intestacy, if any, did not occur because of ignorance of the extent of the property she owned, but either from inadvertence or design, or from a mistake as to the legal effect of the residuary clause: *Estate of Hayne*, 165 Cal. 568, 133 Pac. 277.



It is held that the proposition involved in the codicil was not complicated, but simple, and consisted merely in directing that, as the gifts already given to the daughter and son were of unequal value, the daughter having received more advances in value than the son, the same should be equalized in the final division of the property: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

#### REFERENCES.

Gift to one spouse by parent of the other as advancement or ademption, see note 26 L. R. A. (N. S.) 1050.

The matter of advancements is dealt with in a note to the case of *Crain v. Mallone*, 132 Am. St. 359; *Elliott v. Western Coal Co.*, 134 Am. St. 401.

Disposal, loss, or destruction of subject matter, or payment of debt, as ademption of specific legacy or devise, see note 40 L. R. A. (N. S.) 542, 553, 561.

### 9. APPLICATION OF LEGACIES TO PAYMENT OF DEBTS.

When it is necessary that some of the real property of an estate be sold to pay indebtedness and all the real property has been disposed of by specific devises the property under each devise is liable equally for the payment of the indebtedness: *Howe v. Kern*, 63 Or. 487, 125 Pac. 938.

Where a will contains a provision purporting to devise real estate to several persons, followed by a direction that it be sold by the executor and that the proceeds be divided equally among such persons, the right with respect to such property acquired by one of them is subject to the lien of a judgment existing against him at the time of the testator's death: *Penalosa State Bank v. Murray*, 86 Kan. 766, 121 Pac. 1117. (See page 1599.)

#### REFERENCES.

As to upon whom the liability of an heir or devisee for his decedent's debts devolves at his own death, see note 39 L. R. A. (N. S.) 689.



## 10. FUTURE INTERESTS. (See page 1600.)

## 11. PREFERRED LEGATEES. (See page 1600.)

## 12. CREDITOR AS LEGATEE.

Where a testator who was the holder of a note gave to the maker a legacy of \$1000 to be credited on the note such legacy is a specific bequest which vests at the time of testator's death and thereafter the note ceases to carry interest as against the legatee to the extent of the \$1000: *Martin v. Barger*, 62 Wash. 672, 114 Pac. 506. (See page 1600.)

## 13. CONDITIONAL AND CONTINGENT DEVISES.

To create a condition in the case of a devise or bequest apt words to that end must be used. It is not necessary, however, that any particular form of words shall be employed, but whenever it clearly appears from the language used, aided, it may be, in a proper case by extrinsic evidence, that it was the intention of the testator to impose a condition precedent or subsequent, such intention will be given effect: *In re Gray's Estate* (N. Dak.), 146 N. W. 724.

Where a gift is made by will to a public body upon condition that it will provide funds for the purpose of making such gift available the gift is void where such public body has not power to provide the funds contemplated: *Robbins v. Hoover*, 50 Colo. 610, 115 Pac. 527.

A disposition of real property by words of direct present devise "to be distributed and delivered" to the devisee when he shall have reached the age of twenty-one years, and shall have in writing signified his consent to carrying out the life work of the testatrix as outlined by the articles of incorporation and by-laws of the "Christ Doctrine Revealed and Astronomical Science Association," in which event "he shall take in fee simple," but that should he fail in that regard the property "shall then remain a part" of the estate, and go to such association, is a devise upon condition subsequent as to such devisee, and vests in him a present estate: *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131.



The rule of construction embodied in section 1336 of the Civil Code that "words in a will referring to death of survivorship, simply, relate to the time of the testator's death," etc., is applicable only where there are words referring to death or survivorship, simply. It is not applicable where the words refer to death upon a contingency, as, for example, to death "without issue," and there is no provision in our codes declaring what the rule should be where the words refer to death upon a contingency: *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926.

The question whether a will with a restraint upon remarriage imposed a valid limitation on the life estate granted to the widow, or created a prohibited condition subsequent imposing a restraint on marriage, was necessarily presented for decision on the petition for final distribution, and the decision reached thereon would be conclusive as to the respective rights of the devisees and legatees: *Estate of Fitzgerald*, 161 Cal. 319, 119 Pac. 96.

A provision in a will providing for the forfeiture of a legacy or devise in the event of a contest of the will by the beneficiary is not against public policy. Such a provision is valid and will be enforced according to its terms, notwithstanding the beneficiary may have had probate ground for the contest: *Estate of Miller*, 156 Cal. 119, 103 Pac. 842.

A person can bequeath a crop yet to be grown the same as he can contract for sale of same or can mortgage it. A bequest of all wheat of which testator was the owner stored on lands belonging to him and one-half of all grain that might be raised on such lands during a year named was a specific bequest: *Rock v. Zimmerman*, 25 S. Dak. 241.

A will gave the estate of the testatrix to her seven children, share and share alike, subject to these conditions and qualifications: The testatrix claimed in the will that two sons were indebted to her in stated amounts and provided that unless such amounts were paid before her death they should be deducted from the sons' portions of the estate. The sons brought suit to set aside the will. Held extrinsic evidence was not admissible to dispute the claim of indebted-



ness made in the will, and thereby increase the shares given to the contestants: *Hopper v. Sellers*, — Kan. —, 139 Pac. 365. (See page 1600.)

#### REFERENCES.

Effect of fact that breach of condition in devise or legacy relating to conduct of devisee or legatee is involuntary on latter's part, see note 27 L. R. A. (N. S.) 684.

As to whether court will determine whether condition in devise or bequest as to good conduct or character of beneficiary has been satisfied where that duty has been imposed on no one else, see note 25 L. R. A. (N. S.) 425.

Right of court to control discretion vested by will in one person to determine whether or when another fit to receive legacy or devise, see note 25 L. R. A. (N. S.) 421.

Validity of provision in restraint of marriage as affected by fact that the gift to which it relates is to a daughter or other female relative, see note 49 L. R. A. (N. S.) 606.

Provision in restraint of marriage in a deed or will as a condition or a limitation, see note 49 L. R. A. (N. S.) 615.

Validity of condition in restraint of marriage as affected by fact that a breach entails only a partial forfeiture, see note 49 L. R. A. (N. S.) 627.

Devises or bequests conditioned upon divorce or separation or limited upon its continuance, see note 49 L. R. A. (N. S.) 637.

As to what language creates a condition subsequent, see note in 79 Am. St. 747.

As to the manner of taking advantage of breaches of conditions subsequent, see note in 93 Am. St. 572.

As to what are conditions precedent, see note in 102 Am. St. 366.

As to undue influence and presumptions respecting, see notes in 21 Am. St. 94, 31 Am. St. 670.

#### 14. ACCUMULATIONS.

A bequest of one-half of the income from certain real properties to the nephew of the testatrix to be deposited in a bank and there remain until he arrives at the age of twenty-one years, when the fund "shall become and be" his property, is valid. It is not invalid as a bequest of a future contingent interest, nor as an authorized "accumulation" of assets, nor as a suspension of the power of alienation for a period not provided by law, nor as a creation of a trust not permitted by law. The bequest is a vested interest: *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131.



In case an estate vests immediately in a devisee, because of the invalidity of attempted limitations, the income and use of the property follow the fee: *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131. (See page 1601.)

15. ANNUITIES. (See page 1601.)

16. BENEFICIARIES OF BENEFIT CERTIFICATES.

Where the by-laws of a benefit society prescribe a form to be used by members in designating beneficiaries of death benefits, and provide that "the society does not accept or recognize the validity of any provision or provisions made in any document disposing of the benefit or part of the same except the declaration which has been duly made out in conformity with the by-laws," the designation of a beneficiary in a will filed with the society does not constitute a valid designation, and the mere receiving and filing of the will by the society will not operate as a waiver of the by-laws so as to estop the society from setting up the invalidity of the designation in an action brought against it to recover the amount of the benefit: *Monizi v. Santo Antonio Society*, 21 Haw. 591. (See page 1601.)

REFERENCES.

Testamentary power over insurance benefit certificate, see note 17 L. R. A. (N. S.) 1083-1088.

17. AFTER ACQUIRED PROPERTY.

Land conveyed to executors in trust for persons interested in estate, upon full payment of price under testator's contract for its purchase, held part of estate passing by testator's will in same manner as if deed had been executed prior to testator's death: *Newlove v. Mercantile Trust Co.*, 156 Cal. 657, 105 Pac. 971. (See page 1602.)

18. COMMUNITY PROPERTY.

Where a testator makes a devise of both separate and community property to his wife, and does not declare the  
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same to be in lieu of her community right, the fact that she also claims the right to succeed to one-half of certain other community property devised to others than herself does not preclude her from taking the property devised to her: *Estate of Prager*, 166 Cal. 450, 137 Pac. 37.

A testator is presumed to have made his will with knowledge that his power of testamentary disposition did not extend to the surviving wife's interest in the community property, and it is also presumed, in the absence of anything in the will to the contrary, that he did not intend to devise or bequeath her one-half: *Estate of Prager*, 166 Cal. 450, 137 Pac. 37.

Where a testator in a will not disposing of any property, expresses a wish that the property shall be considered as community property such wish is not controlling and in such case, courts would have to consider property separate property if found to be such: *In re Claiborne's Estate*, 158 Cal. 646, 112 Pac. 278.

Where the entire estate was community property, an undivided half of the property was all that the testator could, and was all that he attempted to, pass by means of his testamentary disposition. The other half vested at once in his surviving wife: *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

The provisions of the law of the state of California giving the wife a one-half interest in the community property and depriving the husband of the power to dispose of such moiety by will, except with the consent of the wife, are well known, and are peculiar as compared with the laws of other states. Owing to the fact that this share is given to her absolutely and in this manner, and because of its peculiarity, it has become common usage to describe this interest in community property as that to which the wife is legally entitled under the laws of California: *Estate of Roach*, 159 Cal. 260, 113 Pac. 373.

Where a testator, who died leaving a surviving wife and a brother and sister as his only heirs, provided by his will that



his property, all of which was community, should go to his wife during her life and upon her death, "after deducting the portion of which she is legally entitled under the laws of the state of California," the remainder should be equally divided among his brothers and sisters, or their descendants, according to the laws of distribution, the "remainder" to which the brother and sister are entitled is a one-half interest in the entire community property, only the other one-half interest going to the wife's heirs or as she might direct by will or otherwise: *Estate of Roach*, 159 Cal. 260, 113 Pac. 373. (See page 1602.)

### 19. ELECTION BY WIDOW, OR HEIRS.

(1) **In general.** A will may be so framed as to put either the surviving spouse or any heir, to his election whether he will take under the will or surrender his rights under it and take what the statute grants: *Estate of Gray*, 159 Cal. 159, 112 Pac. 890.

In case of an election by a widow to take under the will of her deceased husband it is essential that the probate court explain to her its provisions and her rights under it and also her rights under the law in the event of her refusal to take under the will. But in case of a written consent by her that the husband dispose of more than one-half of his property to others than his wife it is only essential that she act freely and understandingly: *Weisner v. Weisner*, 89 Kan. 352, 131 Pac. 608.

That property out of which homestead was granted to husband was devised to testatrix's sister and husband was given \$1000, held not sufficient to require election: *In re Gray's Estate*, 159 Cal. 159, 112 Pac. 890.

It is presumed that testatrix knew that her power of disposition was subordinate to power of court to carve out homestead: *In re Gray's Estate*, 159 Cal. 159, 112 Pac. 890.

The mere fact that provision, however liberal, is made in the will for the wife, is not enough to justify the conclusion that such provision was intended to be in lieu of her interest



as survivor of the community; the widow's obligation to elect arises only where the testator has, by the terms of the will, clearly manifested the intention to make the testamentary gift to her stand in lieu of her interest in the community property: *Estate of Prager*, 166 Cal. Dec. 450, 137 Pac. 37.

A settlement and compromise between the widow and the other beneficiaries under the will, to the effect that she should take under the will as well as survivor of the community, estops them from asserting the contrary: *Estate of Prager*, 166 Cal. 450, 137 Pac. 37.

It is not within the power of the husband, by any provision of his will, to deprive the widow of her right to a family allowance from the estate under the statutes, or in anywise to limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed. But, of course, he may so frame his will that she can not have the benefits thereby given her and those of the statutes also, and she will then be put to her election which she will take: *In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209.

It is not essential to the imposition of the duty of election by the widow between the provisions of the will and the statutory allowance that a declaration to the effect above stated should be expressly made. It is sufficient that it should clearly appear from the language of the will that such was the intention of the testator: *In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209.

In the absence of such an express declaration there is no presumption of an intention on the part of the testator to put the widow to her election. To accomplish this result it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law: *In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209.

Where an order granting an allowance had been made in favor of the widow of deceased, on appeal from such order by the residuary legatees, evidence held to show that the testator did not intend any provision of the will to be in lieu



of her right to an allowance as provided by statute: *In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209.

A will may be so framed as to put either the surviving spouse or any heir to his election whether he will take under the will, or surrender his right under it and take what the statute grants: *Estate of Gray*, 159 Cal. 159, 112 Pac. 890.

Where the will of a married woman contains no language designed to put the surviving husband to his election between a pecuniary legacy and his statutory right to a homestead in her separate property, the husband is not put to an election from the mere fact that the property out of which the homestead was granted was specifically devised to a third person: *Estate of Gray*, 159 Cal. 159, 112 Pac. 890.

No presumption arises from the fact of the devise, that the testatrix meant thereby to force an election upon her husband. The presumption is that she executed her will with knowledge that her power of disposition was subordinate to the power of the court to carve out a homestead for a limited period from her separate estate: *Estate of Gray*, 159 Cal. 159, 112 Pac. 890.

In the absence of any statute fixing the time in which a widow is to make her election she may make the same at any time, and lapse of time will not affect her right to take under the law: *Hodgkins v. Ashby*, — Colo. —, 139 Pac. 541.

When the wife dies without ever having given her consent to the will of her husband which does not on its face purport to convey away from her more than one-half of his estate, her heirs take one-half of the estate: *Hodgkins v. Ashby*, — Colo. —, 139 Pac. 541. (See page 1603.)

#### REFERENCES.

Necessity of electing between claiming own property which the will attempts to dispose of and a legacy or devise in lieu of dower or other fixed right, see note 42 L. R. A. (N. S.) 1127.

Who may elect against will in behalf of insane widow, see note 35 L. R. A. (N. S.) 1210, 49 L. R. A. (N. S.) 1108.

As to election by widow between benefits of will and rights to dower or community property, see note in 92 Am. St. 695.



**(2) Taking both by descent and under the will.** (See page 1604.)

**(3) Where dower right prevails.** When a widow fails to make an election she is held to take the share she would have taken if her husband had died intestate: *Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074. (See page 1604.)

**(4) Effect of election.** (See page 1604.)

#### REFERENCES.

Acceleration of gift over by widow's election against will giving life estate, see note 18 L. R. A. (N. S.) 272-277.

Effect of spouse's election to take against will upon rest of will, see note 27 L. R. A. (N. S.) 602.

**(5) Election under mistake or misapprehension.** When the owner of an estate, in an instrument of donation, either deed or will, uses language with reference to the property of another which if that property were his own would amount to an effectual disposition of it to a third person, and by the same instrument gives a portion of his own estate to that same owner whose rights of ownership he had thus assumed to transfer, such owner and donee is put to an election between his claim of title to the property so assumed to be disposed of by the donor and his right as donee under the instrument: *Herrick v. Miller*, 69 Wash. 456, 125 Pac. 976.

Extrinsic evidence is not admissible to establish intention of testator to dispose of property over which he had no power of disposition, for the purpose of forcing an election by the donee between an independent interest and the testamentary provision: *Herrick v. Miller*, 69 Wash. 456, 125 Pac. 976. (See page 1605.)

**(6) Election by acceptance of devise.** (See page 1605.)

**(7) Election by acts in pais.** An election to take under a will, may be inferred or implied from the conduct of the party, his acts, omissions, modes of dealing with the prop-



erty, acceptance of rents and profits, and the like: *Owens v. Andrews*, 17 N. Mex. 597, 131 Pac. 1004.

The principal rule of law precluding the revocation of an election is necessarily the doctrine of estoppel, and there can be no estoppel where there is no injury: *Owens v. Andrews*, 17 N. Mex. 597, 131 Pac. 1004.

In order to constitute an implied election or election in pais it must be clear that the person alleged to have elected was aware of the nature and extent of his rights and it must be shown that having that knowledge he intended to elect: *Hodgkins v. Ashby*, — Colo. —, 139 Pac. 542. (See page 1605.)

## 20. VESTING AND DEVESTING OF ESTATES.

(1) **In general.** Under a will which directly devised to the six sons of the testator all of his real estate, share and share alike, and provided that no portion thereof should be sold until ten years after his death and that, should any of the sons contract certain enumerated bad habits before such division his share should be forfeited, or should he die before such division, his share should be divided in a specific manner, each of the sons acquired a vested interest at the time of the testator's death in the undivided share devised to him, subject to divestiture or termination upon the happening of the subsequent act or event specified in the will. Such vested interest could be transferred by the devisee: *Newlove v. Mercantile Trust Co. of San Francisco*, 156 Cal. 657, 105 Pac. 971.

A legacy or an interest created by devise should always be construed as vested rather than contingent. Where a testator devised all of his real property to his wife for life, directing that part of it should be sold at her death, and out of the proceeds a legacy should be paid to his daughter, the interest of the daughter in the legacy vested at the death of the testator and the daughter's death prior to that of the wife did not cause a lapse of her legacy which passed to her heirs: *Stevens v. Carroll*, 64 Or. 417, 129 Pac. 1045.



A will takes effect at the death of the testator and its existence does not impair his power over the property during his life: *Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551.

Making will does not prevent conveyance of willed property prior thereto: *Boye v. Andrews*, 10 Cal. App. 494, 102 Pac. 551.

The estate of a decedent vests in his heirs or devisees and legatees immediately upon his death, and such devisees and legatees do not derive title from the decree of distribution but from the will: *Western Pac. Ry. Co. v. Godfrey*, 166 Cal. 346, 136 Pac. 284.

A legatee of corporation stock who accepts such stock on distribution is the owner thereof from the date of the death of the testator: *Western Pac. Ry. Co. v. Godfrey*, 166 Cal. 346, 136 Pac. 284. (See page 1606.)

Testamentary dispositions, devises, and bequests to a person on attaining majority are presumed to vest at the testator's death: *Estate of Budd*, 166 Cal. 286, 135 Pac. 1131.

#### REFERENCES.

As to when legacies are vested and when contingent, see note in 10 Am. St. 471.

(2) **As to expectancies.** (See page 1607.)

(3) **Gifts inter vivos distinguished.** A gift obtained by any person standing in a confidential relation to the donor is prima facie void and the burden is thrown upon the donee to establish to the satisfaction of the court that it was the free, voluntary, unbiased act of the donor. A court of equity watches said transactions with a jealous scrutiny, and to set them aside it is not necessary to prove actual fraud, or that there was such a degree of infirmity or imbecility of mind in the donor as amounts to legal incapacity to make a will: *Jenkins v. Jenkins*, 66 Or. 12, 132 Pac. 543. (See page 1607.)

(4) **Gifts causa mortis distinguished.** An allegation in a complaint seeking to set up that a gift was causa mortis



is bad unless it avers that the gift was made in contemplation of death: *Hillman v. Young*, 64 Or. 73, 129 Pac. 124.

A gift *causa mortis* is subject to the conditions: (1) It must be made in contemplation, fear, or peril of death. (2) The donor must die of the illness or peril which he then fears or contemplates. (3) The delivery must be made with the intent that title shall vest only in case of death: *O'Neil v. First Nat. Bank*, 43 Mont. 505, 117 Pac. 890. The validity of such a gift is determined by the law of the place where it is made, without reference to the domicile of the donor: *Id.*

Gifts *causa mortis* can not be consummated by mere parol. There can be no such gift without an intention to give and a delivery either actual or constructive, of the thing given. The donor must part with all dominion over the property, so that no further act is required of him or his personal representative, to vest the title perfectly in the donee, if it be not reclaimed by the donor during his life. If the possession of the donee does not continue the gift is at an end. He must take and retain possession until the donor's death: *Hamlin v. Hamlin*, 59 Wash. 182, 109 Pac. 365. (See page 1607.)

(5) **Property under contract of sale.** Direction for sale of all realty, and use of proceeds for a home, held not to include land covered by testatrix's contract of sale made by her after will was made: *In re Dwyer's Estate*, 159 Cal. 664, 115 Pac. 235.

Civil Code, Secs. 1301, 1303, providing that testator's agreement to sell property previously devised shall not revoke disposal but property shall pass subject to remedy of specific performance against devisees, and that conveyance, settlement, or other act of testator altering his interest in the thing previously disposed of by will shall not operate as revocation, held not applicable to land as to which trustees were given naked power of sale for founding a home: *In re Dwyer's Estate*, 159 Cal. 664, 115 Pac. 235.



In view of section 1301 of the Civil Code, providing that testator's agreement for sale of property previously devised does not revoke testamentary disposal, but that property passes subject to purchaser's remedy on contract, contention that such contract converted land into personalty which would go to legatees held untenable: *In re Goetz's Estate*, 13 Cal. App. 198, 109 Pac. 145.

Power of sale held not to embrace land which testatrix contracted to sell after will was made: *In re Dwyer's Estate*, 159 Cal. 664, 115 Pac. 235. (See page 1608.)

**(6) Property subject to trust.** (See page 1608.)

**(7) Deeds as affected by deeds in escrow.** (See page 1608.)

**(8) Contingent remainders.** Where a will devised property to trustees in trust to pay the income to the surviving widow of the testator and to his married daughter, and to the survivor of them during life, and devised the remainder upon the termination of the trust to the then living children of the married daughter, or her then living grandchildren by right of representation, such devise of the remainder is of a contingent remainder, which does not vest in any child or grandchild of the daughter until her death: *Estate of Washburn*, 11 Cal. App. 735, 106 Pac. 415.

Where a testator bequeathed \$50,000 for a home and hospital in a city named for a building, provided the city or the county would support it, otherwise to revert back to and be divided among certain legatees, on the primary gift being declared void as depending upon an unenforceable condition precedent the money should go to the stated legatees and not to the residuary legatee: *Board of Regents v. Wilson*, 54 Colo. 510, 131 Pac. 423.

Under the provisions of section 4538 of the Rev. Codes of Idaho an action may be maintained by a remainderman for the protection of a contingent remainder, as against one who claims an estate or interest in the property adverse to



such remainderman: *Wilson v. Linder*, 18 Ida. 438, 110 Pac. 274, 138 Am. St. 213.

Where a contingency named in a will, upon which an absolute estate may vest in one devisee as against another, is unlimited as to time, and is such a contingency as may never occur either prior or subsequent to the death of the testator, and might also occur at any time, the contingency should not be limited by construction to the period prior to the death of the testator, so as to exclude therefrom the possibility of that contingency happening during the period subsequent to the death of the testator and prior to the death of the devisee: *Wilson v. Linder*, 18 Ida. 438, 110 Pac. 274, 138 Am. St. 213.

In the case of a devise, postponed to take effect upon the termination of a particular estate, with a gift over in case of the death of the remainderman "without issue," if there is nothing in the context or in the surrounding circumstances to indicate the intention of the testator, then the ordinary meaning of the words is that the reference is to death at any time it may occur, and that the happening of the contingency is to determine the result: *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926.

The circumstances surrounding the making of the will in question showed that the testator left him surviving as heirs at law his childless second wife, then aged fifty-six years; a son, William, aged forty-two years and unmarried; another son, John, aged thirty-nine years, having one child; and a daughter, Elizabeth, aged forty-six years, who was married and had three young children. At the time the will was executed the testator was seventy-four years of age, was then very ill, and was expected to die, and did die six days afterward. By the terms of his will he devised his farm, which comprised the bulk of his estate, to his wife and his son William "during the lifetime of my said wife, and at her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William, that in case said William dies without issue his property herein specified becomes the property of John,



and at his death goes to Elizabeth." Held, that upon the prior death of the wife, the son, William, did not become vested with an unconditional and unqualified fee, but that the fee was limited upon the condition of his dying at any time without issue, and that upon his so dying, subsequent to the death of the wife, the property would pass to John and Elizabeth successively: *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926. (See page 1608.)

#### REFERENCES.

Contingent remainder as subject of devise by remainderman, see note 21 L. R. A. (N. S.) 121.

Expectant and contingent interests in real property as subject of attachment or levy on execution, see note 30 L. R. A. (N. S.) 115.

To what time is the contingency of death of a legatee or devisee without child or issue, upon which a gift is conditioned, referable see note 25 L. R. A. (N. S.) 1045.

As to whether the heirs who take under a possibility of reverter are determined at the time of the ancestor's death or at time of the termination of the fee, see note 18 L. R. A. (N. S.) 624-627.

**(9) Lapsed legacies and devises.** A provision in a will giving property to a local camp of Modern Woodmen is not void because the will was witnessed by members of such camp; but fraternal insurance orders being under the rules and restrictions of the statute, such local camp is not competent to take and hold property given to it by will, its legal source of income being dues, premiums, and assessments. When a testator has attempted to devise and bequeath to such camp real and personal property, his heirs may assert the invalidity of such provision and the inability of the camp to take thereunder: *Kenneth v. Kidd*, 87 Kan. 652, 125 Pac. 36.

Prior to 1905 amendment of Civil Code, Sec. 1310, legacies as distinguished from devises lapsed by legatee's death before testator: *In re Goetz's Estate*, 13 Cal. App. 292, 109 Pac. 492.

Civil Code, Sec. 1310, as amended in 1905, giving lineal descendants of relatives dying before testator what relatives would have taken by will, does not apply where contrary



intent is expressed in will: In re Goetz's Estate, 13 Cal. App. 292, 109 Pac. 492.

Not applicable where will had clause in these words: "and devise so bequeathed by me should die, prior to my death the legacies, to them mentioned in this will shall lapse, and such legacies shall form a part of my residuing estate": In re Goetz's Estate, 13 Cal. App. 292, 109 Pac. 492.

Under Code, Sec. 1343, declaring that legacy shall not fail by death of legatee before testator, where will shows intention to substitute some other person, legacy to sister, but, in case of her death prior to receiving legacy, to certain of her children, held not lapsed by sister's death: In re Heberle's Estate, 155 Cal. 723, 102 Pac. 935.

Death of wife before testator held not to defeat right of grandchildren to take under will giving them personalty on termination of life trust for wife's benefit: In re Gregory's Estate, 12 Cal. App. 309, 107 Pac. 566.

Legacies to strangers in blood, who predeceased testatrix became a part of the undisposed residuum of the estate and would pass to the heirs at law: Estate of Kunkler, 163 Cal. 797, 127 Pac. 43.

A will disposing of a certain portion of an estate, and providing that the residue should be reduced to cash and divided among certain named legatees in named proportions, will not be construed as creating a class, so that upon the death of one his portion would pass ratably to the others, but rather would such legacy be considered to have lapsed and pass to the lineal descendants of the testator, according to the statutes of descent and distribution: Estate of Kunkler, 163 Cal. 797, 127 Pac. 43. (See page 1608.)

#### REFERENCES.

Devolution of lapsed legacy or devise where will contains residuary clause, see note 44 L. R. A. (N. S.) 789.



(10) **Altered circumstances.** (See page 1609.)

(11) **Forfeiture of legacies.** Provisions forfeiting the interests of contesting devisees are valid and will be enforced: In re Hite's Estate, 155 Cal. 436, 101 Pac. 443.

Testator's meaning of word "contest" is controlling: In re Hite's Estate, 155 Cal. 436, 101 Pac. 443.

Filing opposition to probate of will whose codicil reduced opposer's bequest, moving to strike parts of proponent's answer, etc., held "contest" so as to forfeit bequest: In re Hite's Estate, 155 Cal. 436, 101 Pac. 443.

Contest worked forfeiture though there was no gift over: In re Hite's Estate, 155 Cal. 436, 101 Pac. 443.

Forfeiture provision applicable to codicils and forfeiture not prevented by rule of strict construction against forfeitures or by Civil Code, Sec. 1342, providing that testamentary dispositions shall not be divested except on occurrence of precise contingency prescribed by testator: In re Hite's Estate, 155 Cal. 436, 101 Pac. 443.

Provision forfeiting legacy of any contestant held not contrary to public policy: In re Miller's Estate, 156 Cal. 119, 103 Pac. 842.

Widow unsuccessfully contesting will held to forfeit legacy though she had reasonable cause: In re Miller's Estate, 156 Cal. 119, 103 Pac. 842.

One does not forfeit a legacy of personalty because as to realty he accepts a decree of distribution inconsistent with the will: In re Learned's Estate, 156 Cal. 309, 104 Pac. 315.

## 21. ESTATES TAIL IN KANSAS.

Estates tail still exist in the state of Kansas, and where a testator devised specific tracts of land to each of four children and to the heirs of the body of the particular devisee and by the residuary clause bequeathed all personal property to his surviving children, share and share alike, it was



held that the children took an estate tail by the devise and one of them having died after the testator but without children acquired an undivided interest in the reversion in fee expectant on her death without issue, which interest on her death passed to her husband: *Ewing v. Nesbitt*, 88 Kan. 708, 129 Pac. 1131.







# **PART XVI.**

## **PROBATE OF WILLS.**

### **CHAPTER I.**

#### **PROBATE OF WILLS.**

- 1. Nature of proceeding.**
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  - (4) Destruction of will as effecting.**
- 3. Parties.**
  - (1) Who may apply for probate.**
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- 4. Notice of application for probate.**
- 5. Pleadings.**
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- 7. Evidence.**
  - (1) Testimony of subscribing witnesses.**
  - (2) As to identity of persons misnamed.**
  - (3) Wills executed by blind persons.**
  - (4) Presumptions as to the will.**
  - (5) Alteration of will, effect of.**
  - (6) Will on different sheets of paper. Connection thereof.**
- 8. Order or decree admitting will to probate.**
  - (1) In general.**
  - (2) Effect of decree.**
  - (3) Establishes the will prima facie.**
  - (4) Conclusiveness of decree.**
  - (5) Decree annulling the will.**
  - (6) Gives right to letters testamentary.**
  - (7) Collateral attack.**
- 9. Probate of after-discovered will.**



10. Revoked will can not be admitted to probate.
11. Admission to probate under special act.
12. Probate of holographic will.
13. Costs of probate.
14. Custodian of will, duty and liability of.

### 1. NATURE OF PROCEEDINGS.

Probate proceedings in the settlement of estates are in the nature of proceedings in rem and upon the statutory notices being given all the world is charged with notice: *Connolly v. Probate Court*, 25 Ida. 35, 136 Pac. 208.

The admission of a will to probate is a judicial act and like other valid judgments can not be collaterally impeached for any error or irregularity, but is binding until reversed or set aside according to law: *In re Hayes's Estate*, 55 Colo. 340, 135 Pac. 452.

The probating of a will is a judicial act and as such it can not be avoided or set aside save in the manner provided by law and this is true even though the probate be in common form. Apparently the only difference between the finality of probate in solemn form and in common form is as to the time when the probate becomes conclusive. Probate in solemn form becomes conclusive upon rendering the decree to that effect because it is upon notice to all who are interested. Probate in common form becomes equally conclusive upon the expiration of the time fixed by statute for contesting the will after its probate, except as to certain persons under disability: *Horton v. Barto*, 57 Wash. 477, 107 Pac. 194.

Probate proceedings are as a general rule regarded by all courts as proceedings in rem, yet some of the courts when they come to apply the doctrine of notice, seem to disregard the rule applicable to proceedings in rem and apply the rule applicable to proceedings in personam, and if these distinctions are not kept in mind when the cases are examined confusion may result and it may be concluded that the conflict among the courts with respect to probate proceedings is much greater than it really is: *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 524. (See page 1632.)



REFERENCES.

Right to dismiss or withdraw proceedings to probate or contest a will, see note 19 L. R. A. (N. S.) 121-124.

2. JURISDICTION OF COURTS.

(1) **In general.** The petition for probate of a will invests the court with jurisdiction of the estate and it appearing that the will offered by contestant is valid, he will not be permitted to withdraw same: *In re Tresidder*, 70 Wash. 15, 125 Pac. 1037.

The probate court may issue commissions to take depositions pending an appeal to the district court from an order refusing to remove an administrator and refusing to appoint in his stead an executor named in a will. Such appeal in no manner affects the jurisdiction of the probate court over further proceedings as to the probate of the will: *Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 399.

The commissioner named in the commission to take depositions thereby becomes an officer of the court issuing the commission and no proof is required of his being a justice, or of his authority to administer oaths, or of his signature: *Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 399.

The probate court has no right to require a guardian ad litem to agree not to contest the will if his wards are paid the legacies coming to them thereunder: *Robbins v. Hoover*, 50 Colo. 610, 115 Pac. 530.

Where a testator, at the time of his death, was a resident of the state of California, his will must be proved originally as a domestic will in the county of his residence, and, so far as that state is concerned, it can not be proved elsewhere and brought into that state for the purposes of secondary or ancillary administration: *Estate of Zollikofer*, 47 Cal. Dec. 234, 138 Pac. 995.

A document offered for probate in the state of California as a foreign will, under sections 1322 to 1324 of the Code of Civil Procedure, must be denied probate therein, if the testator, at the time of his death, was a resident of that



state, and there was no evidence given at the hearing to show the execution of the will other than the decree of the foreign court admitting it to probate, and no offer made to prove the execution of the will as an original document: Estate of Zollikofer, 47 Cal. Dec. 234, 138 Pac. 995.

Such foreign probate affords no legal proof in this state of the existence of the will purporting to be probated, and does not show an interest in the estate of the decedent, on the part of a person whose only claim of interest was based upon a legacy under such purported will: Estate of Zollikofer, 47 Cal. Dec. 234, 138 Pac. 995.

In a proceeding to probate a will under the provisions of Mansf. Dig. Ark. 1884, Sec. 6521 (Ind. T. Ann. Stats. 1899, Sec. 3593), the only issue triable is the factum of the will or the question of devisavit vel non. In such proceeding the court lacks jurisdiction to construe the will or determine the rights of the parties or the validity of any devise therein: Nesbit v. Gragg, 36 Okla. 703, 129 Pac. 705.

In a proceeding to probate a will under the statutes of Oklahoma the only issue triable is the factum of the will or the question of devisavit vel non: Taylor v. Hilton, 23 Okla. 354, 100 Pac. 537.

Where on a trial of the issue of devisavit vel non the court finds the testamentary paper produced to be the last will of the deceased, it is error to reject any portion of it: Taylor v. Hilton, 23 Okla. 354, 100 Pac. 537.

In the state of Washington probate matters are administered by the superior court as a court of general jurisdiction, both as to legal and equitable matters: In re Hoscheid's Estate, — Wash. —, 139 Pac. 66.

A court of probate in the state of Colorado has no power to admit a will of a husband or wife to probate as conveying the whole estate unless the written consent of the surviving wife or husband has been given, because in the absence of such written consent such will is by the very terms of the statute inoperative as to the survivor's share of the estate. Where the application for the probate of a will comes on to



be heard and the consent in writing of the surviving wife or husband has not been given, the court has no jurisdiction to admit such will to probate as conveying the whole estate, but must admit it subject to the survivor's right of election. The written consent being a statutory requirement, it is its absence and not the cause or reason of its absence, which qualifies and restricts the jurisdiction of the court. The question is strictly a jurisdictional one: *Hodgkins v. Ashby*, — Colo. —, 139 Pac. 541. (See page 1633.)

#### REFERENCES.

Jurisdiction to admit to probate will not probated at testator's domicile, see note 33 L. R. A. (N. S.) 658.

**(2) Prerequisites to jurisdiction.** A formal petition for probate of a will is usual but not necessary under Rem. & Bal. Code, Secs. 1288, 1297: *In re Pierce's Estate*, 63 Wash. 437, 115 Pac. 836. (See page 1634.)

#### REFERENCES.

When an instrument executed with the formalities of a will, but not couched in formal testamentary phraseology, may be admitted to probate, see note 41 L. R. A. (N. S.) 39.

Contents of will as affecting right to probate, see note 34 L. R. A. (N. S.) 963.

**(3) As to nonresidents.** (See page 1634.)

**(4) Destruction of will as affecting.** (See page 1635.)

**(5) Involves power to postpone hearing.** (See page 1635.)

### 3. PARTIES. (See page 1635.)

**(1) Who may apply for probate.** (See page 1635.)

**(2) Who can not oppose probate.** (See page 1636.)

### 4. NOTICE OF APPLICATION FOR PROBATE.

The statutes do not prescribe any particular form of proof that notice of the hearing of an application to probate a will was given, nor require that the proof of publication shall



be placed on record in any prescribed form: *Stead v. Curtis*, 205 Fed. 439.

Jurisdiction having once been acquired by a court of record, it will be presumed that the parties had due notice of all subsequent proceedings, unless the record affirmatively shows the contrary: *Stead v. Curtis*, 205 Fed. 439.

On an appeal from an order admitting a will to probate, a recital in the order of the giving of notice of the hearing of the petition for probate is sufficient to establish the truth of the fact recited, unless the record affirmatively shows that the recital is untrue: *Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233.

The presumption arising from the recital in a decree admitting a will to probate, that it was proved that due notice of the hearing had been given, is not overcome by the presence in the files of an incomplete affidavit of publication: *Stead v. Curtis*, 205 Fed. 439. (See page 1636.)

#### REFERENCES.

As to presumption probate proceedings regular, arising from lapse of time, see note Ann. Cas. 1913A 1038.

#### 5. PLEADINGS. (See page 1637.)

- (1) **Petition for probate.** (See page 1637.)
- (2) **Issues.** (See page 1637.)

#### 6. BURDEN OF PROOF. (See page 1638.)

- (1) **In general.** (See page 1638.)
- (2) **Presumption of sanity.** (See page 1638.)

#### 7. EVIDENCE.

- (1) **Testimony of subscribing witnesses.** Where all the requirements of the statute regarding the acknowledgment and attesting of a will have been complied with, excepting that the witnesses could not remember, ten years afterward,



whether or not the testator's signature was on the paper, in the absence of evidence to the contrary it is to be presumed that it was, and that the will was executed in accordance with the statute: *In re Carey's Estate*, — Colo. —, 136 Pac. 1175.

Under the requirements of the Colorado statute governing the execution, proof, and probate of wills, considered at large, the word attested, by intent of the legislature, includes not only the mental act of observing, but as well the manual one of subscription; and further that such subscription must, by the express terms of the statute, be in the presence of the testator, so that where two persons saw a testator execute a purported codicil and heard him declare it to be such, but only one of them subscribed it in his presence though the other subscribed it out of his presence, it is insufficiently attested: *International Trust Co. v. Anthony*, 45 Colo. 474, 101 Pac. 782. (See page 1638.)

#### REFERENCES.

Burden of explaining erasures or alterations appearing on face of will, see note 17 L. R. A. (N. S.) 184-186.

(2) **As to identity of persons misnamed.** (See page 1639.)

(3) **Wills executed by blind persons.** (See page 1640.)

(4) **Presumption as to the will.** (See page 1640.)

(5) **Alteration of will, effect of.** (See page 1640.)

(6) **Will on different sheets of paper. Connection thereof.** Where a will offered for probate consists of several separate sheets not permanently fastened together, only the last one bearing the signature of the testator, the connection of the subject matter may be sufficient to establish prima facie the identity of the other sheets: *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 136 Am. St. 110.



## 8. ORDER OR DECREE ADMITTING WILL TO PROBATE.

(1) **In general.** The amendment of 1907 to section 1349 of the Code of Civil Procedure, providing that in the order admitting the will to probate, "the court must ascertain and determine whether said estate is worth more or less than \$10,000, which determination is conclusive for the purpose of giving notice to creditors," is void as being special legislation prohibited by section 25 of article IV of the constitution, there being no similar provision applicable to intestate estates and a class is thereby created which is not founded upon any natural, intrinsic, or constitutional distinction: *Estate of Becker*, 20 Cal. App. 513, 129 Pac. 795.

The filing by the clerk of an order signed by the judge in open court is not an essential or necessary part of the making of the order, or of the date of the admission of the will to probate; and the fact that it was filed five days after the admission of the will to probate was immaterial: *Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

When the will of a husband which does not on its face purport to convey away from his wife more than one-half of his estate, comes on for probate, and the wife has not given her written consent thereto, the will must be admitted subject to her right of election, or as conveying only one-half of the estate, and can not be admitted in any other way: *Hodgkins v. Ashby*, — Colo. —, 139 Pac. 541. (See page 1640.)

(2) **Effect of decree.** (See page 1641.)

(3) **Establishes the will prima facie.** A decree of distribution of the estate of a deceased person which has been administered as an intestate's estate, although it has become final, is not a bar to the subsequent admission to probate of the will of the decedent. The admission of such will to probate is not an attack, direct or collateral, upon the decree of distribution, and is authorized to establish the status of that instrument as a will, in order that the devisees and legatees claiming under it may be in a position to assert their rights in equity against the distributees as involuntary



trustees of the rightful owners of the property of the estate: *Estate of Walker*, 160 Cal. 547, 117 Pac. 510. (See page 1641.)

**(4) Conclusiveness of decree.** The probate of a will "in solemn form" is allowed under certain conditions under the laws of the state of Colorado after probate in common form, which latter method is conclusive of the validity of the will in all actions wherein its execution or contents are brought in question: *In re Hayes's Estate*, 55 Colo. 340, 135 Pac. 452.

The admission of a will to probate or its rejection is final and conclusive as against all parties unless appealed from within the time provided by statute and in default thereof not even a court of equity has power to set the order of admission or rejection aside even on the ground of fraud, this being the one remarkable exception to the general rule as to the universality of equitable jurisdiction to relieve in cases of fraud: *In re Hoscheid's Estate*, — Wash. —, 139 Pac. 63.

The statute of Colorado declares that an order admitting a will to probate is conclusive as to the validity of the contents of the will only so far as determined at probate: *Hodgkins v. Ashby*, — Colo. —, 139 Pac. 541. (See page 1642.)

**(5) Decree annulling the will.** (See page 1642.)

**(6) Gives right to letters testamentary.** (See page 1642.)

**(7) Collateral attack.** A decree of a county court of Oregon of which a testatrix was at time of her death a resident, admitting her will to probate can not be collaterally attacked: *Sappingfield v. Sappingfield*, — Or. —, 135 Pac. 334.

If the court, however, has once acquired jurisdiction of the property and of the parties by the giving of the statutory notice a judgment or decree affecting either or both is not assailable collaterally by any one interested in the property, although he may at such proceeding have taken no part therein: *Barette v. Whitney*, 36 Utah 574, 106 Pac. 526.



**9. PROBATE OF AFTER-DISCOVERED WILL.**

(See page 1642.)

**REFERENCES.**

Right to probate will after distribution of property as intestate, see note 36 L. R. A. (N. S.) 89.

**10. REVOKED WILL CAN NOT BE ADMITTED TO PROBATE.** (See page 1643.)**11. ADMISSION TO PROBATE UNDER SPECIAL ACT.** (See page 1643.)**12. PROBATE OF HOLOGRAPHIC WILL.**

A holographic will with only the year written and with blanks for the day and month left unfilled, is not dated within the meaning of section 1297 of the Civil Code, and the court properly denied a petition for its probate: *Estate of Price*, 14 Cal. App. 462, 112 Pac. 482. (See page 1643.)

**13. COSTS OF PROBATE.**

While section 1720 of the California Code of Civil Procedure gives to the court a discretionary power of allowing costs and expenses incurred upon the contest of a will and permits it to be exercised in favor of an unsuccessful proponent of a will, the power should be exercised only where such proponent has acted in good faith: *Estate of Berthol*, 163 Cal. 343, 125 Pac. 750.

Where the contest of a will has resulted in mistrials from failure of the jury to agree, the court has no power to order the payment of the expenses of the contestants out of the estate in the hands of a special administratrix and the order for such payment is void: *Estate of Yoell*, 160 Cal. 741, 129 Pac. 999.

When a will offered for probate is contested, the "benefit" derived therefrom inures to the successful claimants, which is the benefit contemplated by the rule making the



expenses payable out of the estate as a benefit thereto: In re Statler's Estate, 58 Wash. 199, 108 Pac. 434.

While section 1720 of the Code of Civil Procedure places the matter of allowing costs and expenses incurred upon the contest of a will within the discretionary power of the court, and permits it to be exercised in favor of an unsuccessful proponent of a will, still this discretionary power should be exercised in his favor only "as justice may require," where he has acted in good faith, and can be properly exercised only upon the final determination of the litigation: Estate of Berthol, 163 Cal. 343, 125 Pac. 750.

An order allowing an unsuccessful proponent of a will his costs and expenses incurred in the contest, prior to the final determination thereof, is premature, and will be reversed without a consideration of the merits: Estate of Berthol, 163 Cal. 343, 125 Pac. 750.

Under section 1720 of the Code of Civil Procedure, the superior court sitting in probate may, in its discretion, allow costs and expenses to the proponent of a will failing of probate, "as justice may require," where he has acted in good faith, but such discretion can be exercised only upon the final determination of the litigation: Estate of Berthol (Mousnier v. Taylor), 163 Cal. 343, 125 Pac. 750.

It is only after a final determination of the controversy respecting which the allowance is claimed that the court can properly determine whether it would be justified in making the allowance or not; an allowance made before such time, the action of the court will be reversed on appeal: Estate of Berthol (Mousnier v. Taylor), 163 Cal. 343, 125 Pac. 750, following Estate of Yoell, 160 Cal. 741, 117 Pac. 1047.

Where the contest of a will has resulted in mistrials from failure of the jury to agree, the court has no power to order the payment of the expenses of the contestants out of the estate in the hands of a special administratrix, and the order for such payment is void: Estate of Yoell, 160 Cal. 741, 117 Pac. 1047.



It is not within the scope of the powers of a special administrator to make such payment, and it is not within the scope of the power of the court to order any such payment by him out of the funds of the estate: *Estate of Yoell*, 160 Cal. 741, 117 Pac. 1047.

An order of the court for the payment of expenses of a contest, if valid in other respects, can only be made payable in the due course of administration of the estate: *Estate of Yoell*, 160 Cal. 741, 117 Pac. 1047.

Until the will has been admitted to probate, or probate has been denied, the court has no power to appropriate the funds of the estate to aid either the proponent or the contestant: *Estate of Yoell*, 160 Cal. 741, 117 Pac. 1047.

Costs or expenses can only be allowed as incident to a judgment or final order of the court. It is only at the final determination of the litigation that the discretion of the court to award costs or expenses out of the estate can be properly exercised: *Estate of Yoell*, 160 Cal. 741, 117 Pac. 1047.

It is an abuse of discretion in proceedings to contest a will after probate for the court to order the costs and attorney fees incurred by the executor in making an unsuccessful defense to be paid out of the estate, if the jury finds that the execution of the will was procured through his fraud and undue influence: *Estate of Jones*, 166 Cal. 147, 135 Pac. 293.

Reimbursement for expenses incurred in the effort to sustain a will procured by the fraud or undue influence of the person defending it against contest not only may, but should, in the exercise of a sound discretion, be denied: *Estate of Jones*, 166 Cal. 147, 135 Pac. 293.

There is no provision in the code of the state of Washington that the costs and expenses of an unsuccessful contest of the probate of a will shall be paid out of the estate and costs should not be allowed in such cases: *In re Evo's Estate*, — Wash. —, 140 Pac. 680. (See page 1643.)



#### 14. CUSTODIAN OF WILL. DUTY AND LIABILITY OF.

Under the provisions of section 7080, Rev. Stats. 1908 of Colorado, a person who has in his possession or that there is good reason to believe has in his possession the last will of any deceased person and secretes or willfully withholds the same is liable to attachment by the court having jurisdiction to receive the probate of such will and upon arrest may be examined thereon and if found guilty may be punished as for contempt of court by a fine not exceeding \$500, or by imprisonment until he produces the will or accounts therefor to the satisfaction of the court: *Walch v. Orrell*, 53 Colo. 361, 127 Pac. 141.

A complaint charging a defendant with secreting or willfully withholding a will is fatally defective if it does not allege that the will was such a one that the county court in which the proceedings were brought had jurisdiction to receive the probate of: *Coulter v. People*, 53 Colo. 40, 123 Pac. 648.



## CHAPTER II.

### CONTEST OF PROBATE

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  - (6) Parties. Who entitled to appeal.
  - (7) Time of appeal.
  - (8) Consideration of appeal.
  - (9) Review of verdict or findings.
  - (10) Direct and collateral attack.
  - (11) Effect of appeal as to executor's powers.
13. No review in equity.

## 1. NATURE OF PROCEEDING. (See page 1664.)

## 2. JURISDICTION.

(1) **In general.** The superior court, being vested with general jurisdiction in probate, has, upon the presentation of a will, accompanied by a proper petition for the probate thereof, and the appearance of qualified persons to contest the same, the power to proceed and to entertain such contest, and under section 1306 of the Code of Civil Procedure the question whether all of the interested parties have appeared is, so far as those actually present are concerned, one which the court is required to decide, not before exercising jurisdiction, but in the exercise of the jurisdiction conferred by the appearance of those present, and therefore error in that regard, if any be committed, is not jurisdictional, but is an irregularity in procedure subject to review only on appeal or by motion in the proceeding itself; and a final judgment in such contest, adverse to the contestants, constitutes a valid estoppel against them: *Stead v. Curtis*, 205 Fed. 439.

As a prerequisite to the maintenance of a contest to revoke the probate of a will, the citation provided for by section



1328 of the Code of Civil Procedure must be issued within a year after probate, and the proceeding should be dismissed for any failure in that respect, if there is no voluntary appearance within a year of all persons entitled to a citation: *Estate of Ricks*, 160 Cal. 467, 117 Pac. 539.

An executor of and sole beneficiary under a will, who, with the exception of the contestant, was the sole heir of the decedent, waives the right to object to a defective issuance of service of the citation, by voluntarily appearing in the proceeding, within two weeks after the institution of the contest, and filing a demurrer as "the proponent and legatee named in the will": *Estate of Ricks*, 160 Cal. 467, 117 Pac. 539.

Where the contestant fails in his contest, he is not injured by the failure to serve the citation on nonresident legatees and devisees: *Estate of Land*, 166 Cal. 538, 137 Pac. 246.

The refusal of the court to issue a supplemental citation for service on legatees and devisees residing without the state does not affect the jurisdiction of the court to proceed with the trial as to the contestant and such defendants as have been served with citation: *Estate of Land*, 166 Cal. 538, 137 Pac. 246.

A proceeding to probate a will pending in the United States court at Wewoka, at the time of the admission of the territory of Oklahoma into the Union, which was transferred to the district court of Seminole County and by such court transferred to the county court of Seminole County, and by that court transferred to the county court of Hughes County and was pending in such last named court when a petition to set aside the probate of the will was filed. Held that the county court of Hughes County is the successor in probate matters of the United States court for the Western District of the Indian Territory and the proper court in which to file a petition to set aside the probate of a will probated in the United States court for the Western District of the Indian Territory at Wewoka: *Scott v. McGirth*, — Okla. —, 129 Pac. 519.



A county court co-extensive with the county is a court of original jurisdiction in all probate matters: *Scott v. McGirth*, — Okla. —, 139 Pac. 519. (See page 1664.)

**(2) Mandate to restore contest.** (See page 1664.)

**(3) Power to grant nonsuit.** Section 1313 of the Code of Civil Procedure providing that after the impanelment of a jury in the contest of a will, the trial "must be conducted in accordance with the provisions of part two, title eight, chapter four of this code," authorizes the granting of a motion for a nonsuit in such contest, in a proper case: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

In an action to revoke the probate of a will on the ground of undue influence it is held that the evidence presented by the contestant falls far short of measuring up to the degree of proof required to establish undue influence, or requisite to have warranted the lower court in submitting the issue to the jury and therefore that a nonsuit was properly granted: *Estate of Hodgman*, 23 Cal. App. 415, 138 Pac. 111.

In determining whether or not in a proceeding to contest a will, the evidence produced by the contestant is sufficient to require the submission of the case to the jury, the same rule applies as in civil cases. Every favorable inference fairly arising from the evidence produced must be considered as proved in favor of the contestant, and where the evidence is fairly susceptible of two constructions, the court must take the view most favorable to the contestant, and if there is any substantial evidence tending to sustain the contest, the contestant is entitled to have the case go to the jury upon its merits and a nonsuit is improper: *Estate of Daly*, 15 Cal. App. 329, 135 Pac. 953.

Nonsuit grantable in proper cases, Code Civ. Proc., Sec. 1313, requiring trial to proceed after impanelling of jury, according to part 2, title 8, Ch. 4, contemplating nonsuits: *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

In this proceeding for the revocation of the probate of a will on the ground of undue influence, the evidence presented by the contestant falls far short of measuring up to the  
Probate Sup. 34.



degree of proof required to establish undue influence, or requisite to have warranted the lower court in submitting the issue to a jury; and for these reasons the motion of the respondent for a nonsuit was properly granted: *Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111.

Section 1313 of the Code of Civil Procedure, providing that after the impanelment of a jury in the contest of a will, the trial "must be conducted in accordance with the provisions of part two, title eight, chapter four, of this code," authorizes the granting of a motion for a nonsuit in such contest, in a proper case: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

Where a will and a codicil are contested in a single petition, the proponent had a right to move for a nonsuit, both as to the will and codicil, or as to either, at the close of contestant's case, and if in the opinion of the court the evidence was insufficient to warrant submitting the question of the validity of either instrument to the jury it was the duty of the court to grant a nonsuit accordingly. Upon such nonsuit being granted, even if it applied to only one branch of the contest, the party in whose favor it is ordered is entitled to a judgment thereon: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

Only final judgments can be pleaded or proved as res adjudicata; and a judgment, entered upon an order granting a nonsuit of a contest of a will does not become final while an appeal therefrom is pending, or until the time to appeal therefrom has expired: *Estate of Ricks*, 160 Cal. 468, 117 Pac. 539. (See page 1664.)

### 3. PARTIES.

(1) **In general.** Where a devise was made in favor of plaintiff under a prior will, and a second will devised the whole property to one of the defendants, the plaintiff had the legal right to contest the second will on the grounds of incompetency of the deceased to make it and undue influence of said defendant exerted over the deceased, and the waiver of that right of contest constitutes a sufficient con-



sideration for a note given by such defendant to the plaintiff: *Harris v. Munro Co.*, 10 Cal. App. 589, 102 Pac. 821.

Where one would have inherited property but for the existence of a will his heirs at law have such an interest in the will as to enable them to maintain a contest thereof: *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 744.

If an intestate would have inherited a testatrix's property but for her will and if that intestate was so far insane as to be incapable of managing his own affairs from a time preceding the testatrix's death until his own death subsequent to hers, the heirs at law of the intestate have such an interest in the testatrix's will as to entitle them to maintain a contest thereof: *In re Siebs' Estate*, 70 Wash. 374, 126 Pac. 913.

Heirs have legal right to contest ancestor's will: *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960.

Legatee under prior will may contest later will excluding him, regardless of tenable grounds, though he is stranger to testator's blood, and though prior will has not been offered for probate: *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960.

Agreement by heir or legatee under a prior will whereby he waives his right of contest is legal and is sufficient consideration for agreement by legatees under later will to compensate him and will be enforced in absence of fraud or other vitiating element, and presumption is that it was fair and honest: *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960.

Where the interest of a person seeking to contest a will is not established by the pleadings, the trial court has the power to require the contestant to establish his interest before proceeding with the trial of the issues involving the validity of the will: *Estate of Land*, 166 Cal. 538, 137 Pac. 246.

A person having such a pecuniary interest in the devolution of the testator's estate as will be impaired or defeated by the probate of a will or be benefited by setting it aside,



is "a person interested" who may contest its probate: *Estate of Land*, 166 Cal. 538, 137 Pac. 246. (See page 1665.)

**(2) Who may not contest.** Where the interest of a person seeking to contest an alleged will is not established by the pleadings, the trial court has power to require the contestant to establish his interest before proceeding with the trial of the issues involving the validity of the will: *Estate of Land*, 166 Cal. 538, 137 Pac. 246.

Where a testatrix dying without issue had separated from her husband three years before her death, her next of kin, in order to contest the will, must show that her husband was dead or divorced at the time of her death; there being no presumption from the lapse of such period of time: *In re Siebs' Estate*, 70 Wash. 374, 126 Pac. 912.

A proceeding for revocation of probate of a will can not be maintained by any person unless he is in some way interested in the will. If he is a legal heir of the deceased that constitutes a sufficient interest. But if he is not an heir he must show that he has some interest in the estate of the deceased which the will he attacks would jeopardize: *Estate of Zollikofer*, 47 Cal. Dec. 234, 138 Pac. 995. (See page 1665.)

One whose only interest in a will is a legacy under a prior will giving him five thousand dollars is not "a person interested" who may contest the validity of the latter will which gives him the same amount payable at the same time: *Estate of Land*, 166 Cal. 538, 137 Pac. 246. (See page 1665.)

**(3) Duty of executor to defend.** (See page 1666.)

#### 4. TIME OF CONTEST.

In the case of a contest of a will before probate the California Code of Civil Procedure nowhere in terms prescribes when the written opposition must be filed. Obviously to be effectual as a contest before probate it must be filed before the alleged will is admitted to probate and the statute contemplates that it will be filed at or before the time designated in the notice for the hearing of the petition for probate. But the person proposing to contest before probate



does not forfeit his right to do so merely by reason of failing to file his opposition at or prior to the time so designated in the notice for the hearing: *Estate of Mollenkopf*, 164 Cal. 576, 129 Pac. 997.

Where the contest of a will was not instituted within the year provided by the statute and the court thereby failed to acquire jurisdiction, a proper case for the issuance of a writ of prohibition is presented: *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 Pac. 496.

Where a statute provided that every person who shall sign a testator's name to any will by his direction shall subscribe his own name as a witness to such will and state he subscribed the testator's name at his request, and such provision was not complied with, but notwithstanding such failure the will was admitted to probate the question must be raised in the probate court within the year allowed for contesting the will: *Horton v. Barto*, 57 Wash. 477, 107 Pac. 194.

In the case of the contest of the probate of a will, written grounds of opposition must be filed, but there is no provision as to the time when such grounds must be filed; hence where a hearing was begun at 10 o'clock and after examination of certain witnesses, the hearing was postponed until 2 o'clock, before which time the written grounds were filed, they will be considered as filed in time: *In re Mollenkopf's Estate*, 164 Cal. 576, 129 Pac. 997.

Where a former wife of testator with knowledge of his death within the year after the probate of his will allowed for contest, took no steps reasonably calculated to discover whether he left any estate or any will, or whether his estate had been probated, she was guilty of such laches as would defeat her petition, filed fourteen years thereafter to set aside the probate: *In re Hoscheid's Estate*, — Wash. —, 139 Pac. 67.

In construing section 5166, Comp. Laws 1909 of Oklahoma, as applied to infants and persons of unsound mind, said section must be read and construed in connection with



section 5172, Comp. Laws 1909, and when so read and construed it seems clear that the latter section relieves an infant of the diligence required of adults under section 5166, to contest the probate of a will within one year, or to show that the evidence relied upon was discovered since the probate of the will. Section 5172 gives an infant a right to contest the probate of a will upon either or all of the few grounds specified in said section 5166 free from conditions precedent in respect to diligence specified in said last section: *Scott v. McGirth*, — Okla. —, 139 Pac. 519. (See page 1666.)

#### REFERENCES.

As to the right to jury trial of will contest, see note 15 Ann. Cas. 211.

As to who may contest will, see note in 130 Am. St. 186.

#### 5. GROUNDS OF CONTEST.

(1) **On ground of invalid execution.** (See page 1667.)

(2) **Insanity.** If the testator was of sound mind at the time the will was executed his precedent and subsequent condition is immaterial: *In re Murphy's Estate*, 43 Mont. 353, 116 Pac. 1009, 137 Am. St. 110.

Insanity, to invalidate the will, must either amount to general mental incompetency, or some hallucination or delusion directly bearing upon and influencing the creation and terms of the will: *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

Insanity on some particular subject is not necessarily fatal to will: *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

Where testator's belief is not so fixed that he can not be reasoned out of it, it will not be held to be a delusion: *In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629.

One may have bad temper and under its influence have said and done wrong and unnatural things and still not be laboring under insane delusion as to objects of hostility: *In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629.



While the law takes no account of a man's religion, courts do recognize the fact that a man may through manifestations of religious belief evidence mental disorder, and while testamentary capacity is not to be measured by religious belief or opinion, yet if those opinions are of a nature which produces a will which is wholly the result of them, in other words, if the will in question would not have been made if the testator had not entertained some peculiar religious belief, his testamentary capacity may well be doubted so that when it appears that a testator is prompted by his belief in an insane religious delusion to make a will, the will can not be sustained: *Ingersoll v. Gourley*, 72 Wash. 462, 129 Pac. 209. (See page 1667.)

**(3) Undue influence.** Undue influence is such influence as imposes a restraint on the will of the testator, who, but for the restraint, would be free and responsible, so that his testamentary act is not the result of his own volition, but the will of another. The theory underlying the doctrine of undue influence is that the testator is induced by the means employed to execute an instrument in form and appearance his will, but in reality expressing testamentary disposition which he would not have voluntarily made: *Murphy v. Nett*, 47 Mont. 38, 130 Pac. 453.

In trying an issue of undue influence alleged to have been exerted by the beneficiaries upon the testator in the making of his will, every fact from which the inference might be legitimately drawn that such influence had or had not been exerted, or, if exerted, that it had or had not been effective, is admissible provided the time of its exertion is not so remote that no effect can reasonably be attributed to it, and that such evidence tends to show that the effect of the influence was operative upon the mind and will of the testator when he executed the instrument: *Welch v. Barnett*, 34 Okla. 166, 125 Pac. 473.

Undue influence can not be exerted upon a person who is so far insane or unconscious as to be destitute of testamentary capacity: *In re Murphy's Estate*, 43 Mont. 353, 116 Pac. 1005, 137 Am. St. 110.



The fact that a will is written by a daughter of the testator who is named as the executrix but is not otherwise favored over the other children does not raise a presumption of undue influence: *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 136 Am. St. 110.

To destroy the validity of a will "undue influence" must amount to coercion, compulsion or constraint, which destroys the testator's free agency and by overcoming his power of resistance obliges him to adopt the will of another instead of exercising his own. It must be brought to bear directly upon the testamentary act, and particular parties must be benefited or disfavored as the result of the purpose and pressure of the dominating mind: *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634.

Where a testator by designing means and improper influences has been deprived of his usual volition and induced to execute an instrument not his will, although such in form, but in reality the will of another, it is a fundamental rule in the law of wills to annul such instrument for undue influence even though it be conceded that the testator had testamentary capacity, the theory being that he did not freely exercise the same: *In re Patterson's Estate*, 68 Wash. 377, 123 Pac. 518, 132 Am. St. 116.

Mere persuasion, argument, or importunity addressed to the judgment or affections in which there is no fraud or deceit or coercion does not constitute undue influence. To vitiate a will an influence must be shown which at the time of the testamentary act, controlled the volition of the testator and prevented an exercise of his judgment and choice: *In re Patterson's Estate*, 68 Wash. 377, 123 Pac. 518, 132 Am. St. 116.

A charge of undue influence is substantially one of fraud and can seldom be shown by direct and positive evidence, and a court should be liberal in admitting evidence of all circumstances which may tend to throw light upon the relations of the parties and upon the disputed questions of undue influence: *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 959.



Undue influence consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating on it; some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment. It must be such as operates upon the mind of the testator at the time of making the will, and must be an influence relating to the will itself: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

The kind of influence that may be held to be undue influence warranting a repudiation of a will must be such as in effect destroyed the testator's free agency and substituted for his own another person's will. Mere general influence not brought to bear on the testamentary act is not undue influence, but the influence must be used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

Influence must be such as destroys testator's free agency and substitutes another person's will: *In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597.

That is undue influence which amounts to constraint substituting will of another for testator's whether through threat or fraud: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

There must be proof of pressure overpowering mind and bearing down volition at very time will was made: *In re Carother's Estate*, 156 Cal. 422, 105 Pac. 127.

Influence must destroy free agency of testator at time and in very act of making testament: *In re Higgins' Estate*, 156 Cal. 257, 104 Pac. 6.

Undue influence may be exerted either by fraudulent means or devices or by physical or moral coercion without actual deception: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.



Courts have neither the right nor the power to overthrow a will on the ground of undue influence, in the absence of direct and substantial proof bringing the case within those well-established rules of law which define undue influence, and prescribe the extent to which the evidence in any given case must go in order to measure up to the requirements of such definition: *Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111.

Undue influence consists in the exercise of acts or conduct by which the mind of a testator is subjected to the will of the person operating upon it; some means taken or employed which have the effect of overcoming the free agency of the testator, and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment: *Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111.

Courts must refuse to set aside a will upon the ground of undue influence, unless there is proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made: *Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111.

Where a wife makes a will in favor of her husband, no legal suspicion of undue influence arises from their confidential relations so as to impose on him the burden of proving that he has not unduly influenced her in making the will; but such relation and the opportunity afforded thereby may be taken into consideration with other evidence to prove undue influence on his part: *Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111.

In order to establish undue influence sufficient to invalidate a will, it is not necessary to show the elements of duress, menace or fraud: *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

The soundness of mind of a testator does not imply immunity from undue influence, although it may require greater ingenuity to unduly influence a person of sound mind and



body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind: *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

The undue influence which will invalidate a will is any improper or wrongful constraint, machination, urgency or persuasion, whereby the will of the person is overborne, and he is induced to do, or forbear to do, an act which he would not do, or would do, if left to act freely: *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

A will executed upon the faith of a promise on the part of the beneficiary that she would distribute the estate among certain nieces and cousins of the deceased and certain charitable institutions according to the wish and intent of the decedent, if honestly made, can not be said to be procured by fraud or undue influence. If, however, after the death of the testator, the beneficiary fails or refuses to perform the promise, a different question arises, and, although the will stands unaffected, the beneficiary and the property may be charged with a trust in favor of the intended beneficiaries: *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

Nothing less than pressure which destroys free agency can be considered such undue influence as to render invalid the will of a testator: *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 779.

Undue influence, in order to avoid a will, must destroy the free agency of the testator at the time and in the very act of making the testament: *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

Opportunity to exercise undue influence upon the testator in the matter of making his will is not sufficient. The undue influence to render a will void must actually exist; it must be actually exerted, and it must be so exerted as to affect the terms of the will: *In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 934.

Testimony that a beneficiary under a will was in the house of the testator shortly after the will was executed does not bear out the assertion that such beneficiary was present



when the will was made, nor is such testimony sufficient to raise a presumption of undue influence: *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 779.

In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will is not the expression of his own desires. The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves: *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872.

The kind of undue influence that will destroy the instrument must be such as in effect destroyed the testator's free agency, and substituted for his own another person's will: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

The undue influence invalidating a will must be such as destroys free agency, constraining the testator at the time the will is made to make a disposition of his estate contrary to and different from what he would have done if he had been left to the free exercise of his own inclination or judgment: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

Undue influence which will affect a testamentary act must be such influence operating upon the very act itself; an influence exerted and used prior to or at the time of the making of the will and of which the will is the product: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

If the will as made expresses the then well-settled determination of the testator himself concerning the disposition of his property, and there is nothing affirmatively shown to warrant the conclusion that the making of the will was suggested by any other party, it can not be held to have been obtained by undue influence, even though the determination



of the testator to exclude a relative from participation in his property has been in part or even wholly caused by mere misrepresentation of fact by others as to such relative, or is the result of a quarrel or dispute with such relative, inspired and encouraged by another for the very purpose of bringing about a breach and a consequent disinheritance to his benefit: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

Undue influence consists in the exercise of acts or conduct by which the mind of the testatrix is subjugated to the will of the person operating on it; some means taken or employed which have the effect of overcoming the free agency of the testatrix and constraining her to make a disposition of her property contrary to and different from what she would have done had she been permitted to follow her own inclination or judgment. Fraud, defined generally, consists of false statements or false pretenses, or the employment of any trick or device or means of deception for the purpose of defrauding another: *Estate of Ricks*, 160 Cal. 468, 117 Pac. 539.

Where a will was contested on the ground of undue influence it was held that the question whether the testatrix was wrong in her opinion and judgment respecting the indebtedness of her son to her had nothing to do with the question of whether or not she was a free agent in making the will and that evidence disputing the claim of indebtedness was not material: *Hoppers v. Sellers*, — Kan. —, 139 Pac. 365.

Where it is shown that the testatrix did not understand the English language sufficiently to carry on an ordinary conversation or to comprehend the terms of the will which was read to her in the English language and that the will was procured by the principal beneficiaries who stated to the scrivener the terms of the will and it was then drawn according to their dictation and not according to the dictation or desires of the testatrix and that it was not fully explained to her and that she did not understand it as it was read to her in the English language, the will should be set aside: *In re Beck's Estate*, — Wash. —, 140 Pac. 342.



The testator had a right to make a will and if he made it in his right mind in his own good judgment and desire to leave but a pittance to his brothers and sisters that was his privilege and his right. The record suggests a reason therefor which no doubt seemed sufficient to him. It was also a privilege of his wife to solicit him to make a will in which he should leave to her the larger portion or all of his estate. She was his lawful wife and it was his duty to protect her by his will and he evidently desired to do as he did in that respect. The whole record shows that at the time the will was made the testator was fully competent to make it and made it without any undue influence and it is his will: *In re Enos Estate*, — Wash. —, 140 Pac. 680. (See page 1668.)

(4) **Fraud, etc.** Generally the same considerations control when a testator is unduly influenced by misrepresentations and artifices usually comprehended by the term "fraud." Although in strictness fraud and undue influence are distinguishable more often than otherwise it is a mere matter of a choice of terms. Always something sinister is involved which perverts the testator's will by overcoming his power to express his real desires: *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634.

Fraud, defined generally, consists of false statements or false pretenses, or the employment of any trick or device or means of deception for the purpose of defrauding another: *Estate of Ricks*, 160 Cal. 468, 117 Pac. 539.

Mere opportunity or suspicion does not constitute fraud or undue influence: *In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597.

Fraud without undue influence may exist: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

Fraudulent representations, in order to defeat a will, must have been made prior to or at the time the will was executed. In the present case, it is held, after a review of the evidence, that no such representations were shown, and particularly, that there was no evidence that the son, who was the main beneficiary under the will, had falsely or fraudulently repre-



sented to the testatrix that an agreement had been made with the contestant, whereby he relinquished any right to share in her estate: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

Mere fraud does not constitute undue influence, but is an entirely separate and distinct ground for invalidating a will, and while undue influence may be exerted by means of fraud, there can be no such influence without an impairment of the free agency of the testator: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

Undue influence and fraud constitute two separate and distinct grounds, upon proof of either of which a will may be declared invalid, and proof simply of fraud or fraudulent representations will not support equally an issue of undue influence or an issue of fraud: *Estate of Ricks*, 160 Cal. 469, 117 Pac. 539.

Undue influence and fraud are not identical. The one has reference to the subjugation of the will of the testatrix and controlling it. The other to a deception practiced upon the testator. While in a sense undue influence is a species of fraud, it may be exercised without any actual fraud, or false representation being made to the testator: *Estate of Ricks*, 160 Cal. 468, 117 Pac. 539.

When fraud or fraudulent representations made to the testator are relied on as an element in undue influence, it must appear not only that the representations were false and believed to be true by the testatrix, but that they were made the basis of importunity and mental pressure upon the testatrix, and that the testamentary act was the product thereof. When this appears, such fraud is an element in undue influence and upon the proof of its employment to overcome the will of the testator, a finding of undue influence may be based: *Estate of Ricks*, 160 Cal. 468, 117 Pac. 539.

On the other hand, representations which are false, while they may exert an influence upon the testamentary disposition, unless they are made not only for that purpose, but



are used as pressure upon the mind of the testatrix to affect the disposition of her property, constitutes fraud purely. If the testatrix, under a belief in the truth of such false statements, and influenced by them, makes a will disinheriting one who, but for a belief in their truth, would otherwise have been provided for in it, the will is the product of fraud on the testatrix and subject to be declared invalid for that reason: *Estate of Ricks*, 160 Cal. 468, 117 Pac. 539.

Where a will was contested on the ground of fraud it was held that, in the absence of proof connecting the persons charged with the fraud with the making of the will, as inducing or procuring agencies, evidence disputing the claim of indebtedness made in the will was not material: *Hoppers v. Sellers*, — Kan. —, 139 Pac. 365.

As relating to the execution of a will, "fraud" is a species of undue influence; but undue influence may be exercised otherwise than through fraud. Hence where the mind of the testatrix was so perverted by deceit or other sinister means that she lacked power to give expression to her true desires, provisions of the will procured by such influences are void, though she possessed capacity to make the will and was under no coercion: *Hopper v. Sellers*, — Kan. —, 139 Pac. 365. (See page 1668.)

## 6. PLEADINGS.

(1) **In general.** A petition stating the necessary jurisdictional facts is a necessary prerequisite to the probate of a will within the meaning of Secs. 1157, 1159, L. O. L. Where no such petition has been filed, there is nothing to contest and the alleged contest was wholly futile: *In re Burk's Estate*, 66 Or. 252, 134 Pac. 11.

Where petition to set aside the probate of a will under Sec. 5766, Snyder's Laws of Oklahoma, 1909, is neither signed nor verified, the remedy is by motion to strike the petition from the files and not by general demurrer: *Scott v. McGirth*, — Okla. —, 139 Pac. 519. (See page 1668.)

(2) **Unsoundness of mind.** (See page 1669.)



(3) **Undue influence.** In a will contest, allegations at the conclusion of the pleading to the effect that by reason of the "aforesaid relations," and by reason of the undue influence over the testator, as alleged in the complaint and grounds of opposition, a certain person acquired over the mind of the testator an influence, whereby he was enabled to procure the testator to make the will in question, are sufficient to show the particular acts constituting the undue influence: *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171. (See page 1669.)

#### REFERENCES

As to what is undue influence and the tests in that connection, see note, 31 Am. St. 670.

As to aversion to relatives as a test of mental incapacity, see note, 117 Am. St. 582.

#### 7. ISSUES. JURY TRIAL OF.

In the trial of a contest to the probate of a will, the action of the court in withdrawing, of its own motion, an issue of undue influence from the consideration of the jury, even if irregular, will not justify a reversal if the evidence on that issue was so conclusive in favor of the proponent that the court would have been compelled to set aside a verdict in favor of the contestant: *Estate of Higgins*, 156 Cal. 257, 104 Pac. 6.

In the case of *Auld v. Cathro*, 20 N. Dak. 461, it was held (Ellsworth, J., dissenting) that there was no evidence to establish the fact that the will in controversy was executed under undue influence and therefore that the ruling of the trial court refusing to let the issues go to the jury was correct.

After a will had been admitted to probate by the county court appeal was taken to the circuit court and tried before a jury which were unable to agree upon a verdict and were discharged. The court, against objection, thereupon made findings of fact and conclusions of law and entered judgment in favor of the will. It was held that there is no absolute right to trial by jury in the matter of probating a will  
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and that the verdict of the jury is merely advisory, the proceeding not being one at common law but wholly statutory: *Shaw v. Shaw*, 28 S. Dak. 223.

Under the Colorado statute the contestor has the right to have the issue as to whether the writing in question is the last will and testament of the decedent tried to a jury and where both parties requested the court to direct a verdict and the contestor after the refusal of the court to direct a verdict in his favor, failed to request that any specific issue of fact be submitted to the jury, waived his right and the refusal of the court to submit the question to the jury upon the general issue was not error: *Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 400.

Held not prejudicial error for court of its own motion to take issue of undue influence from jury, evidence being conclusive on court in proponents' favor: *In re Higgins' Estate*, 156 Cal. 257, 104 Pac. 6.

The contestant is not entitled to a jury trial upon the question of his interest: *Estate of Land*, 166 Cal. 538, 137 Pac. 246.

The right to a trial by jury secured by the constitution has no reference to or bearing upon proceedings in probate, and the right thereto in such proceedings exists only where the statute expressly confers it: *Estate of Land*, 166 Cal. 538, 137 Pac. 246.

Section 1312 of the Code of Civil Procedure limits the issues of fact that may be tried by a jury to those substantially affecting the validity of the will: *Estate of Land*, 166 Cal. 538, 137 Pac. 246.

In a contest of a will on the ground of fraud and undue influence, where two former wills were allowed in evidence for the purpose of showing the state of mind and feeling of the testator toward the beneficiary, it was for the jury to determine what feeling or state of mind toward those beneficiaries was indicated by these wills: *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058. (See page 1669.)



## 8. BURDEN OF PROOF.

(1) **In general.** In a contest of a will on the ground of undue influence the burden of proof is on the contestant to show facts from which an inference of undue influence could reasonably be drawn: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

Every fact necessary to show the proper execution of a will must be proved by the proponent: *Wendl v. Tucost*, — Or. —, 136 Pac. 1.

Where a contest is filed in the probate court in opposition to the probation of a will and upon the hearing proof is offered by the proponent showing a due execution of the will, the burden of proof is upon the contestant to disprove the *prima facie* case made by the proponent: *Head v. Nixon*, 22 Ida. 765, 128 Pac. 557.

The burden of showing absence of undue influence in the making of a will is upon the executor when he is also the largest beneficiary and was the testator's attorney and prepared the will: *Gidney v. Chapple*, 26 Okla. 737, 110 Pac. 1105.

When a contested will appears to have been duly executed and attested according to the statute of wills, the law presumes it to be valid. This presumption must be overcome by proof and the burden of proof rests upon whoever alleges it to be the product of undue influence or fraud: *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634.

In all such cases the proof must be substantial so that the judges of fact, having a proper understanding of what undue influence is, may perceive by whom and in what manner it has been exercised, and what effect it has had upon the will: *Id.*

The mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator and does not cast upon the beneficiary the burden of disproving undue influence. These conse-



quences follow only when the beneficiary has been actively concerned in some way with the preparation or execution of the will: *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 635.

The burden of proving undue influence is on the contestant, and this burden has not been sustained in the present case: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

In a contest of a will on the ground of undue influence the burden of proof is on the contestant to show facts from which an inference of undue influence could reasonably be drawn: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733. (See page 1670.)

(2) **On issues of insanity.** (See page 1670.)

## 9. EVIDENCE.

(1) **In general.** The matter of receiving oral testimony on a motion for new trial in the contest of a will, in addition to the affidavits required by section 217, Mills Ann. Codes of Colorado, is within the discretion of the trial court: *In re Burnham's Will*, 24 Colo. App. 131, 134 Pac. 259.

In making his proof a contestant is not limited to the bare facts which he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts: *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634.

Suspicion, conjecture, possibility or guess that undue influence or fraud has induced a will is not sufficient to support a verdict to that effect: *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 635.

Power, motive, and opportunity to exercise undue influence do not alone authorize the inference that such influence has in fact been exercised: *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 635.

In an action to set aside a will on the ground of undue influence under a statute providing that the mode of contesting a will shall be by civil action and that the order of probate shall be prima facie evidence of the due attestation,



execution and validity of the will, where there is any evidence tending to establish undue influence, a demurrer to the evidence should be annulled: *Kerr v. Kerr*, 80 Kan. 83, 101 Pac. 647.

Exclusion of answer to question whether witness ever heard any loud talking between testator and son held not error, it not being suggested that such loud talking had any relation to any issue or that it was to be followed up or explained: *In re Weber's Estate*, 15 Cal. App. 1224, 114 Pac. 597.

Question whether testatrix was "easily influenced" held objectionable as calling for conclusion: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

Every favorable inference fairly deducible, and every favorable presumption fairly arising, from evidence produced, must be considered proved in favor of contestant: *In re Daly's Estate*, 15 Cal. App. 329, 114 Pac. 787.

Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, court must take view most favorable to contestant: *In re Daly's Estate*, 15 Cal. App. 329, 114 Pac. 787.

All evidence in favor of contestants must be considered true, and if contradictory evidence has been given it must be disregarded: *In re Daly's Estate*, 15 Cal. App. 329, 114 Pac. 787.

If there is any substantial evidence tending to prove all facts necessary to make out contestants' case, they are entitled to have case go to jury: *In re Daly's Estate*, 15 Cal. App. 329, 114 Pac. 787.

Where a servant of the testator testified on re-examination that the son called on his father more frequently than when she was first employed, the court did not err in sustaining an objection to a further question as to whether she heard any loud talking between them, on the ground that it was immaterial, irrelevant and incompetent, and not re-examination, when it was not proposed to show that the



loud talking had any relation to any issue in the case or that it was to be followed up in any way or explained: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

Declarations of intent not to contest a will made after a settlement would be entirely consistent therewith, and would not tend to impeach the settlement agreement or show bad faith in making the claim: *Snowball v. Snowball*, 164 Cal. 476, 129 Pac. 785.

The admission in evidence of a paragraph of the will of the mother of the testatrix charging her executors with the care and protection of the testatrix is admissible, where the proponent had testified that the mother had not made any such request, and no objection is made to the introduction of the same on the ground of impeachment upon a collateral matter notwithstanding that a motion was thereafter made to strike out upon such ground: *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

The court is not compelled to strike out evidence received without a sufficiently specific objection, where such objection is practically available to the party before the admission of the evidence, and may refuse to do so in the exercise of a reasonable discretion: *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

A letter written by a witness to the contestant that the testatrix was incapable of taking care of herself is improperly admitted on the ground of surprise, where the witness had failed in her deposition to give expected testimony in favor of the contestant: *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

The attempted impeachment of the testimony of a witness as to the mental incompetency of the testatrix, by showing that he had presented a bond with her as surety thereon without intimating to the judge that she was an incompetent person, is properly rebutted by testimony of the witness' knowledge that the deceased was mentally weak and that the family of which he was a member, while recognizing such fact, they, for the purpose of protecting her and



preventing a disclosure of her incompetency, adopted and uniformly carried out a policy of having her business transacted in her own name with the understanding that they stood behind and in support of everything that was done: Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307.

The court had the right to believe the testimony of the executor, as against the testimony of both of the witnesses to the will who testified for the contestant that they did not know what they were signing and that the testator did not explain it to them: Estate of Weber, 15 Cal. App. 224, 114 Pac. 597.

While the inequitable character of a will may be considered, if linked with other evidence tending to show undue influence, the court should not permit a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper: Estate of Kilborn, 162 Cal. 4, 120 Pac. 762. (See page 1670.)

**(2) On issue of insanity.** It is held in this contest to the probate of a will that the evidence was sufficient to justify the verdict upon the issue of unsoundness of mind: Estate of Strachan, 166 Cal. 162, 135 Pac. 296.

On this contest of the probate of a will the evidence properly admitted is held amply sufficient to sustain the findings of the court both that the testatrix did not have the sound and disposing mind and memory essential to the making of a last will and that the instrument offered for probate was the result of undue influence: Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307.

Where a will was contested on the grounds of mental incompetency and undue influence, evidence that a few minutes after he had executed the will, the testator returned to the office of the person who had drafted it, in an apparently nervous condition and in a state of physical collapse, and of statements then made by him to the effect that matters would have been extremely uncomfortable at his home if the will had not been executed, was competent solely upon the issue as to testator's mental condition and was incom-



petent to prove the undue influence, and an instruction so limiting its effect was properly given: *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872.

On the contest of the probate of a will the evidence held sufficient to support the conclusion of mental incompetency: *Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

If a testator against all evidence and probability, believed supposed facts respecting his children, which had no existence except in his perverted imagination, and conducted himself, however logically, upon the assumption of their existence, he is, so far as such facts are concerned, under an insane delusion; and if he was the victim of such a delusion when he executed his will cutting off his children with one dollar each, and if the provisions of the will were caused by such delusion, the instrument is not his will, and its probate may be contested by such children for the mental unsoundness of the testator: *Estate of Riordan*, 13 Cal. App. 313, 109 Pac. 629.

A verdict in a will contest is advisory only. It does not necessarily follow that because a testatrix is physically weak and frail that she is of unsound mind and memory: *In re Hackett's Estate* (S. Dak.), 145 N. W. 438.

Evidence showing only cruelty, harshness, and ungovernable temper, held insufficient to show insane delusion as to children: *In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629.

It is immaterial what amount had been taken by suicide testatrix charged with theft, only issue being her sanity: *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

It is harmless to exclude certain evidence as to cause of death conceded to have been poison: *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

Sanity is presumed and burden on contestant to show incapacity by satisfactory evidence: *In re Weber's Estate*, 15 Cal. App. 224, 114 Pac. 597.



Evidence held insufficient to show incapacity: In re Weber's Estate, 15 Cal. App. 224, 114 Pac. 597.

Of testatrix who committed suicide: In re Chevallier's Estate, 159 Cal. 161, 113 Pac. 130.

The admission of testimony of the contestant of a will that the testatrix was in an infirm mental state at the time immediately following a judicial declaration of her incompetency is not prejudicially erroneous: Estate of Strachan, 166 Cal. 162, 135 Pac. 296.

It is also held that while there was no direct evidence contrary to the testimony of the persons present at the time of the execution of the will that the testator was then of sound and disposing mind, there was, however, substantial evidence on which to found two distinct theories, upon either of which the jury might have reached the conclusion that unsoundness of mind existed at the time of the execution of the will, namely, evidence tending to show gradual increasing dementia ever present though not always manifest, and evidence tending to show insanity which manifested itself by recent attacks with fairly lucid intervals between: Estate of Jones, 166 Cal. 108, 135 Pac. 288.

In a contest of a will on the ground of the alleged incompetency of the testator, the refusal of the court, after the case had been submitted and decided, to allow the proponents to file an amended answer to the contest to cure a supposed defect in the original answer in its denials of the allegations of incapacity is immaterial, where the case was tried on the theory that the competency of the testator was in issue, and the court found upon that question as one of fact: Estate of Loveland, 162 Cal. 595, 123 Pac. 801.

Where the former wife of the testator testified as to the mental condition of the testator about the time the will was executed, the court properly sustained an objection on cross-examination to her opinion as to whether or not the testator was easily influenced: Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915.



In a contest on the ground of insanity it was proper for the court to refuse to permit the proponents to establish the fact of the testator's sanity at a date three years prior to the time when his competency was attacked by the contestants. In the absence of evidence to the contrary, his sanity during such prior period was presumed, and the proponents had the benefit of the presumption: *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801.

In a contest of a will on the ground of the alleged mental incompetency of the testator, the findings of the court to the effect that the testator was not mentally competent to make a will are held to be sustained by the evidence: *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801.

**(3) Suicide. Effect of as evidence.** Suicide is properly considered, but is not of itself proof of insanity or incapacity: *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

**(4) Of undue influence.** In this contest after probate to a will, it was held that while there was no direct evidence of undue influence, there was proof of circumstances from which the jury might have inferred that the beneficiary under the will and other persons conspired to procure its execution and that taking advantage of the weak condition of the testator in his last sickness, they prevailed upon him to make his will contrary to his real intentions: *Estate of Jones*, 166 Cal. 108, 135 Pac. 293.

Upon the contest of a will for undue influence, evidence must show that pressure was brought to bear upon the testamentary act. Though that pressure may be shown by circumstantial evidence, it must do more than raise mere suspicion; but must amount to proof of circumstances inconsistent with the claim that the will was the spontaneous act of the alleged testator. Where no adverse circumstances appear which extend beyond suspicion, and they are not inconsistent with other circumstances showing that the will was the voluntary act of the testator taken under the independent advice of an attorney, the presumption is in favor of the will: *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.



Upon a contest of the probate of a will in favor of a husband forty-three years of age made to him by his wife sixty-three years of age, based upon the charge of undue influence exercised by him over his wife to obtain her will to him of all of her property, worth \$20,000, to the exclusion of her five children and three grandchildren, the contestants are not required to allege the mental or physical weakness or want of mental capacity of the testatrix nor that she was acting under menace, duress, or fraud. None of such allegations is necessary to establish the charge of undue influence: *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

Where a petition specifically attacked the will on the ground that it was not properly attested and that it was executed by reason of the beneficiary's undue influence, testamentary capacity and actual execution are admitted and it is not necessary for proponents to re-probate the will with regard thereto: *Simpson v. Durbin*, — Or. —, 136 Pac. 349.

Where testator left his property to a warm personal friend, to the exclusion of a brother whom he had not seen for forty years and who, he stated, had done him a great wrong, held there was no evidence that the friend had unduly influenced the making of the will: *In re Carey's Estate*, — Colo. —, 136 Pac. 1179.

Mere persuasion on the part of a beneficiary will not overcome the will of a party if it appears that it is his will. It is not influence alone, but an undue influence which has been defined to be such an influence as deprived the party of the free exercise of his intellectual powers, an influence which is exercised by coercion, imposition or fraud; an influence which impels the testator to act in fear, a desire for peace, or some feeling which he is unable to restrain: *In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1035; *In re Miller's Estate*, 36 Utah 228, 102 Pac. 997.

The influence which a child acquires over a parent by kind, dutiful, and affectionate behavior as compared with that of its brothers and sisters and as a consequence whereof the parent leaves it by will a much larger share of the property than is left to the others is not undue influence within con-



templation of the law: *Converse v. Mix*, 63 Wash. 318, 115 Pac. 306.

Section 9787, General Statutes of 1909 of Kansas, requiring certain affirmative proof to establish the validity of a will written or prepared by a person occupying a confidential relation to the testator and who is the sole or principal beneficiary in the will, applies to the single case of a will written or prepared by such a person who receives the whole or the most considerable portion of the estate devised. The statute can not be interpreted as if it read "the sole or one of the principal beneficiaries in the will": *Kelly v. Burgess*, 84 Kan. 29, 115 Pac. 583.

Held natural to dispose of property to relatives with whom testator had lived for many years as against children who did not care for testator: *In re Riordan's Estate*, 13 Cal. App. 313, 109 Pac. 629.

Though unjust will does not of itself raise presumption of undue influence, nature of will may be considered as a circumstance together with value of estate: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

Evidence that testator consulted attorney and acted advisedly in making will held sufficient to overcome presumption of undue influence from confidential relation between testator and child who was chief beneficiary: *In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6.

Evidence of actual attempt by declarations and conduct of one beneficiary to influence testatrix against others held not inadmissible under rule excluding as against other beneficiaries admissions of one as to undue influence: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

False representations by beneficiary charged with undue influence, made to testatrix as to amount of property received by contestant from father to influence testatrix to exclude contestant, held admissible: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.



Evidence held sufficient to sustain finding of undue influence by daughter on aged mother to prejudice of sons: In *re* Snowball's Estate, 157 Cal. 301, 107 Pac. 598.

Though influence is not sufficient to avoid will unless it bears directly on testamentary act, proof is sufficient if such as to warrant inference that will was direct result of influence exerted to procure it, and was not natural result of uncontrolled will of testator: In *re* Snowball's Estate, 157 Cal. 301, 107 Pac. 598.

Evidence held insufficient to show undue influence by testator's wife: In *re* Carither's Estate, 156 Cal. 422, 105 Pac. 127.

To show that will of robust man of fixed ideas was procured by undue influence: In *re* Riordan's Estate, 13 Cal. App. 313, 109 Pac. 629.

Evidence held to sustain finding of absence of undue influence or conspiracy of son and executor in execution of codicil: In *re* Weber's Estate, 15 Cal. App. 224, 114 Pac. 597.

Evidence held sufficient for jury on motion for nonsuit in proceeding for revocation of probate: In *re* Daly's Estate, 15 Cal. App. 329, 114 Pac. 787.

Evidence held insufficient for jury: In *re* Higgins's Estate, 156 Cal. 257, 104 Pac. 6.

In this contest of a will after probate it is held that while there was no direct evidence of undue influence, there was proof of circumstances from which the jury might with reason have inferred that the beneficiary of the will and certain other persons conspired to procure the execution of the will, and that, taking advantage of the weak condition of the testator in his last sickness, they prevailed upon him to make his will contrary to his real intentions: *Estate of Jones*, 166 Cal. 108, 135 Pac. 288.

The fact that the confidential relation of attorney and agent existed between a testatrix and the one charged with procuring the will by undue influence does not in itself prove that the will was procured by undue influence arising from



that relation, nor cast upon him the burden of proving the absence of such influence at the time of its execution: *In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 934.

Where the evidence showed that the husband of the testatrix accompanied her to the attorney's office at the time the will was prepared, and remained in the office within view of, and in a position so that he could see, the parties in the execution of the will, this circumstance was pertinent and of probative force, to be considered in connection with the other circumstances as to whether he exercised undue influence over her: *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

A duly executed will can not be set aside on the ground of undue influence, unless there be proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made: *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872.

In a contest of a will which contained a statement that the testatrix had paid to each of her children and grandchildren his or her full share of the property, it was held that this statement would not be presumed to be true, so as to rebut any inference of unfairness or undue influence, although this statement was not denied in the grounds of contest: *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

In an action to revoke the probating of a will, the evidence held insufficient to show that such will was procured by undue influence, or that the testator did not have sufficient testamentary capacity: *In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 934.

In order to avoid a will on the ground of undue influence, there must be substantial proof of pressure overpowering the volition of the testator. Such proof must raise more than suspicion: *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

It is held that the evidence is amply sufficient to sustain the finding of undue influence, notwithstanding the testimony of the only persons present at the time of its execution that



no such influence was exerted: *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

Upon the contest of a will for undue influence, evidence must show that pressure was brought to bear upon the testamentary act. Though that pressure may be shown by circumstantial evidence, it must do more than raise mere suspicion; but must amount to proof of circumstances inconsistent with the claim that the will was the spontaneous act of the alleged testator. Where no adverse circumstances appear which extend beyond suspicion, and yet they are not inconsistent with other circumstances showing that the will was the voluntary act of the testator taken under the independent advice of an attorney, the presumption is, in the absence of inconsistent proof, in favor of the will, and the circumstances shown do not justify a verdict against its validity: *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.

The mere existence of a confidential relation between the testator and his daughter, who is the contestee, is not enough, when taken alone, to raise the presumption of undue influence on her part upon the testator; but there must be some proof, in addition to such relation, of facts and circumstances showing the use of that relation, at the time the will was made, overcoming the free will and desire of the testator, in order to invalidate the will as to the daughter: *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.

It is held that the trust relation between the testator and his daughter was more nominal than real; that he always had control of his property, and that the trust relation amounted to nothing, in view of the fact that the testator had independent advice, and acted in the absence of his trustee in the preparation of his will, and that any presumption that could arise from the trust relation was fully met and overthrown by the uncontradicted evidence showing the actual circumstances surrounding the preparation and execution of the will: *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.

Where the contestees offered evidence to show that the testator believed his son, the contestant, to be wealthy, he



was entitled to state in rebuttal that he had never stated to the testator that he was wealthy, but was not entitled to show in rebuttal that he was in fact poor, the only issue being as to the testator's belief as to his wealth: *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.

It is held that evidence as to domestic troubles and unhappy married life of the testator with his second wife was competent evidence, in view of an offer of the contestant to show that the daughter, as contestee, took advantage of her father's distress, in bringing about the execution of his will in her favor, to the detriment of the contestant: *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.

Although undue influence may be proved either by direct or circumstantial evidence, yet the facts must go further than to raise a suspicion of undue influence, or to show a mere opportunity to exercise it: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

In a contest of a daughter of the testator to revoke the probate of a codicil of a will in favor of a son, where the daughter charged undue influence exercised by the son and one of the executors over the testator to cause the execution of the codicil, it is held that the court was fully warranted in finding that there was no conspiracy on their part, nor undue influence exercised by them, or either of them, to cause the execution of the codicil: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

Where a will and codicil executed at different dates are contested on the ground of alleged undue influence and fraud, and the evidence presented bore on the validity of both instruments, and the court granted a nonsuit as to the contest of the will, in determining whether any case was made by the contestant showing undue influence as to the execution of the will, or fraud practiced on the testatrix in its execution, the evidence must be considered separately and treated with reference to the different dates when the two instruments were executed: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.



The existence of undue influence may be shown by circumstantial evidence, but such evidence must do more than raise a suspicion. It must amount to proof, and has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

Proof, merely, that confidential relations existed between a testator and the main beneficiary under his will is not sufficient to destroy its validity, but there must be some proof, in addition to the relation of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desires of the testator, in order to invalidate the testament: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

The fact that the sole beneficiary of a will was the son and business manager of the testatrix does not create a presumption that he abused such relation by unduly influencing the making of the will in his favor: *Estate of Ricks*, 160 Cal. 468, 117 Pac. 539.

The fact that a testatrix leaves her estate to two of her sons, to the exclusion of a third, does not indicate that such disposition was the effect of undue influence: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

The mere fact that the relation of mother and son existed between a testatrix and the beneficiary of her will, and that the son was also her business agent at about the time the will was made, is not sufficient of itself to warrant the jury in finding that undue influence was exerted by the son in the making of the will: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

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The mere fact that a beneficiary went with the testatrix to the office of a lawyer, where she executed the will, and was present while she gave her directions as to its provisions, and while she executed it, is a circumstance to be taken into consideration in determining whether there was undue influence, but in the absence of other evidence tending to show it, is insufficient to raise any inference of such influence: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

The mere fact that a person is named as executor and trustee of a will is not sufficient to raise a presumption of undue influence: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

A mere suspicion that undue influence may have been used is not sufficient to warrant the setting aside of a will on that ground. The evidence must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the testator: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

#### REFERENCES.

As to admission of declarations of executor on issue of undue influence, see note Ann. Cas. 1913A 87.

(6) **Testimony of "casual observers."** Notwithstanding the evidence shows that a testator had gross habits of indulgence in intoxicating liquors, a verdict based on the theory that he was of unsound mind at the date of the execution of the will, by reason of alcoholic dementia, is not sustained by the evidence, when the attorney who drew the will and the attesting witnesses each positively testified that he was possessed of testamentary capacity when he signed the will, and the only evidence to the contrary was that of physicians whose testimony was largely speculative and founded entirely upon knowledge gained subsequent to the date of the will, and of other witnesses whose testimony as to his condition when they saw him at other times was just as consistent with the theory of temporary drunkenness as of permanent mental derangement: *Estate of Carithers*, 153 Cal. 422, 105 Pac. 127.



(7) **Expert witnesses.** In a contest of a will where the sole ground is want of mental capacity to make a will, the granting of the motion for nonsuit was not made erroneous by the mere fact that a physician, in answer to a hypothetical question, expressed his belief that the testatrix was insane, from a medical standpoint, there being no other evidence showing the extent or nature of the insanity: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

(8) **Physician as witness.** An attending physician, who had treated a testator professionally at a sanitarium continuously for thirteen days prior to his death and who during that period had diagnosed his case and observed his actions, conduct, and demeanor, but who was not called as an expert, is properly restrained on a contest of his will, from testifying to the physical and mental condition of the testator at the time of the date of his will executed during such period, notwithstanding it was not directly shown, by preliminary inquiries, that all the information he had obtained on such matters was acquired while attending the testator in his professional capacity and was necessary to enable him to prescribe or act for his patient: *Estate of Budan*, 156 Cal. 230, 104 Pac. 442.

It was held in the contest of a will for undue influence that the testimony of a physician who had obtained all his information while attending the decedent professionally was inadmissible under the rule of privileged communications: *Auld v. Cathro*, 20 N. Dak. 461.

(11) **Communications with attorneys.** Where a will is attacked for undue influence, evidence of the attorney who drew the will as to who gave him the data therefor and whose instructions he followed in preparing the same, is not objectionable as a disclosure of confidential communications: *Kerr v. Kerr*, 85 Kan. 460, 116 Pac. 881.

#### REFERENCES.

Privilege of communication to attorney during preparation of will, see 17 L. R. A. (N. S.) 108-113.



**(12) Declarations of legatees, etc.** Declarations and admissions made by the executor and sole beneficiary of the will are admissible against him to establish any fact in issue upon the validity of the will which they have a tendency to establish, and are not limited solely to the purpose of showing the feelings and relations existing between the parties: *Estate of Ricks*, 160 Cal. 469, 117 Pac. 539.

While the general rule is that declarations or admissions of one of several executors, devisees, or legatees are inadmissible in an attack on the validity of a will, because the interests of the parties are several and not joint, this rule has no application where this condition of severalty of interests does not exist: *Estate of Ricks*, 160 Cal. 469, 117 Pac. 539.

Declarations of the contestee as one legatee, made without the presence of the other legatees, are hearsay and not binding upon them; nor can a will be invalidated as against one legatee and upheld with respect to the other legatees: *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.

Where the fact that the testatrix had committed suicide was substantially admitted, the rejection of a declaration of the beneficiary under the will to that effect was without prejudice: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

The relation existing between a beneficiary and the testatrix was confidential in the same sense and to the same extent that the relation of husband and wife living together in harmony is always confidential, but was of itself and in the absence of other evidence tending to show undue influence, insufficient to raise an inference of such influence, or to impose upon the beneficiary the burden of showing its absence, or in the absence of such showing by him to warrant setting the will aside: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

In a contest of a will by a disinherited natural daughter of the testatrix, on the ground of the alleged undue influence of a man who was the main beneficiary, and with whom, although unmarried to him, the testatrix had affec-



tionately lived as a wife for upward of thirty years, it is held that there is nothing in the provisions of such will to raise even a suspicion of improper influence, or to impose upon such beneficiary the burden of showing that he had not used undue influence to procure its execution, in view of the admitted circumstances that the daughter and the testatrix had been practical strangers for the first forty-seven years of the former's life, and had been on unfriendly terms for a period long antedating the making of the will and extending to the time of the death of the testatrix: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

Declarations made by the beneficiary, thirteen years after the execution of the will, evidencing his opposition to any change being made therein to the advantage of the contestant, are insufficient of themselves to show undue influence or false representations on the part of such beneficiary: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

Declarations of a stranger to the will made after the death of the testatrix tending to show that he procured a claim of indebtedness by her sons to the testatrix to be inserted by her in the will, are not binding on the contestees and are inadmissible under the hearsay rule: *Hoppins v. Sellers*, — Kan. —, 139 Pac. 365.

**(13) Declarations of testator. In general.** Declarations of testator are admissible to show mental condition: *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130.

Declarations of testator made before or after execution of will are not admissible to show testamentary intention or exercise of undue influence by others but may be admitted as bearing on his condition or state of mind: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

Declarations ten months prior to execution of will as to intended testamentary disposition held admissible as indicating testatrix's mental attitude toward her children, particularly contestant: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.



Evidence of declarations of testatrix in presence of person charged with undue influence to effect that such person had broken her arm and had hit her with a frying pan, and that such person did not deny truth of such statements, held admissible as admissions where theory of contestants was that prior to death of testatrix's husband, person so charged was uniformly cruel to testatrix but that since then her attitude had changed for purpose of obtaining influence over testatrix to prejudice of contestants: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

Where the will is attacked for forgery, decedent's declarations may be admitted in evidence to show they were inconsistent with statements of fact in the will but not to show testamentary intent at variance with the will: *In re Thomas's Estate*, 155 Cal. 488, 101 Pac. 798.

Testator's disapproval of contestant's marriage held admissible though remote: *In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6.

Evidence that on testatrix's refusal to loan contestant a cultivator, and his inquiry as to reason for her treating him thus, she replied in presence of L. charged with undue influence that L. made her do it, held admissible: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

Evidence of personal differences between proponents and contestants, or either of them and testatrix, held admissible in so far as tending to show testatrix's state of mind with relation to children at times not too remote: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

Declarations made prior to the execution of the will by the person jointly charged with the beneficiary in exercising undue influence, concerning her dealings with the deceased, are admissible: *Estate of Strachan*, 166 Cal. 162, 135 Pac. 296.

In a will contest based on the grounds of both undue influence and insanity, a judgment in favor of the contestant will not be reversed on appeal for error in admitting declarations of the testator on the issue of undue influence, where the



evidence is sufficient to support the verdict as to mental unsoundness: *Estate of Jones*, 166 Cal. 108, 135 Pac. 288.

Statements made by the testator shortly before his death that he wanted to give the contestant his property, and that the latter was his child, are admissible on the issues of insanity and adoption: *Estate of Jones*, 166 Cal. 108, 135 Pac. 288.

On a contest of a will, where the sole issue is that of testamentary capacity, the declarations of the testatrix are admissible, not as evidence of the truth of the statements therein contained, but merely as showing her state of mind and mental condition: *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130.

Where a codicil to a will is contested on the grounds of undue influence and fraud practiced by the sole beneficiary on the testatrix, the evidence of such undue influence and fraud relied upon by contestant being an alleged false and fraudulent statement made by the principal beneficiary to the testatrix, declarations made by the testatrix, in the presence of the executor and sole beneficiary of her will, to the effect that he had made such a statement to her, taken in connection with the conduct of the beneficiary at the time the declarations were made, in not denying the same, are admissible in evidence as an admission on his part of the fact of making such a statement: *Estate of Ricks*, 160 Cal. 469, 117 Pac. 539.

On a contest of a will by a daughter of the testatrix, for alleged incompetency and undue influence, declarations of the testatrix that she intended to leave her property to the contestant were admissible only to show the relations between the two and the state of the testatrix's mind with reference to the daughter. Where unsoundness of mind is not shown, such declarations, not a part of the *res gestae*, are entitled to little or no weight, in the absence of proof of influence as to the very testamentary act: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

Declarations of the testator, made both before and after the execution of the will, tending to show his affection for



his son, who was the contestant of the will as against a daughter to whom he had made a much larger bequest, were admissible, if limited by suitable instructions to their functions as showing friendliness to the son; and it was error to fail to so limit their application: *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.

**(14) When declarations of testator are incompetent.** In a will contest by an illegitimate son, a statement of the testator, made two days before his death and twenty-six days after the execution of his will, that he "was talked into making the will and cutting my boy off without a cent," is inadmissible by the contestant on the issue of undue influence, being no part of *res gestae* of the execution of the will: *Estate of Jones*, 166 Cal. 108, 135 Pac. 288.

The declarations of the testatrix, when not part of the *res gestae*, are not admissible to prove, nor may they be considered by the jury for the purpose of showing, the exercise of undue influence, although they are entitled to be shown and considered for the purpose of illustrating the state of mind of the testatrix when that state of mind was material: *Estate of Ricks*, 160 Cal. 469, 117 Pac. 539.

Declarations of a testatrix made subsequent to the execution of her will are not admissible as proof themselves of undue influence or fraud: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

**(15) Jury as judges of weight of evidence.** Where a codicil to a will is contested on the grounds of undue influence and fraud practiced by the sole beneficiary on the testatrix, the jury is not warranted, in the absence of any proof of the exercise of undue influence by the beneficiary, in finding that such influence had been exercised by him, merely from evidence that he had made a false and fraudulent statement to the testatrix, who was his mother, to the effect that the contestant, who was another of her sons, had made an agreement to relinquish all interest in her estate: *Estate of Ricks*, 160 Cal. 469, 117 Pac. 539.



When once a plaintiff has adduced such evidence as if uncontradicted would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury. If there be sufficient evidence to justify the presentation of the case to the jury and the jury fall into an error in weighing and deciding upon the evidence, the remedy then is by motion for a new trial: *Estate of Chevalier*, 159 Cal. 161, 113 Pac. 130.

(16) **Photographs.** Where the testimony was conflicting as to the accuracy of photographs of the will the exclusion of depositions concerning the genuineness of the signature to the will based on such photographs will not be disturbed: *In re Hayes's Estate*, 55 Colo. 340, 135 Pac. 450.

#### 10. INSTRUCTIONS TO JURY.

Where the question as to whether the testator was of sound mind at the time of executing his will was submitted to the jury and they were unable to agree on an answer thereto it is not error for the court to direct an affirmative answer to be made where there was no evidence upon which the jury could properly have found an answer in the negative: *Hedderich v. Hedderich*, 18 N. Dak. 497.

The court has the same power in will contests to direct a verdict as in ordinary civil suits and whether the court in directing the jury to return the verdict commits error is to be determined by the rules applicable in ordinary civil cases: *Miller v. Weston*, — Colo. App. —, 138 Pac. 428.

Instruction defining testamentary capacity held not erroneous considered in connection with instructions defining "sound mind": *In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6.

Instruction held to properly declare law as to unreasonableness or unjustness of provisions "if there is no defect of testamentary capacity," as against objection that jury were deprived of right to consider terms of will: *In re Higgins's Estate*, 156 Cal. 257, 104 Pac. 6.



Instructions permitting consideration of nature of will as circumstance in determining existence of fraud or undue influence held proper: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

The admission in evidence of the certificate of proof accompanying the admission to probate of an earlier will is not erroneous, where the jury is instructed that the declaration in such certificate is not binding in the contest on trial: *Estate of Strachan*, 166 Cal. 162, 135 Pac. 296.

In a will contest on the ground of undue influence an instruction was not erroneous to the effect that two former wills were admitted in evidence for the purpose of showing the state of mind and feeling of the testator toward the beneficiary therein named, and not specifically to show that she made the will while of unsound mind or through undue influence or fraud: *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

In a will contest on the ground of fraud and undue influence, the court instructed the jury that undue influence and unsoundness of mind were entirely distinct grounds for denying probate of a will; that a person might be the victim of undue influence whether at the time sound or unsound in mind, and that if they found that the testator was of unsound mind at the time of the execution of the will, that it was entirely immaterial whether or not the daughter exercised any undue influence over the testator in the matter of the execution of the will, because unsoundness of mind itself would incapacitate a person from executing a will. It was held that this instruction was not objectionable as authorizing the jury, after finding that unsoundness of mind existed, that they need not consider the evidence relating to undue influence: *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

In a contest of a will on the ground of fraud and undue influence, there was no error in refusing requested instruction to the effect that two former wills were admitted for the purpose of tending to raise the probability of undue influence, and that they were limited to that effect. Such in-



struction would bear upon the effect of evidence: *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

In a will contest where it appeared that a chart kept by nurses of the pulse and symptoms of the testatrix during her last illness had been lost, but there was no evidence that it was willfully destroyed or suppressed or it was kept or delivered to the deponent, such facts did not furnish a basis for an instruction that the evidence willfully suppressed is presumed to be adverse to the party suppressing it: *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

In a contest of a will on the ground of undue influence and fraud, the court refused an instruction to the effect that the amount of undue influence which will be sufficient to invalidate a will must of course vary with the strength or weakness of mind and will of the testator; and the influence which would subdue or control a mind naturally weak, or which had become impaired by age, weakness, or other cause, might have no effect to overcome a mind naturally strong and unimpaired by any of the causes stated. It was held that this instruction correctly stated the law, but there was no error in refusing the same, as the jury had been told in other charges that in considering the issue of undue influence they should take into consideration the age and mental and physical condition of the testator as shown by the evidence; that an influence which he was too weak to resist and which destroyed his free agency and which prevented the free and voluntary action of his judgment amounted to undue influence; and that undue influence was the control of another's will over that of the testator, whose faculties have become so impaired as to submit to their control: *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

## 12. APPEALS.

(1) **In general.** An appeal will lie to the district court from a decision of the probate court refusing to admit a will to probate, notwithstanding the amendment of 1907 (Laws 1907, Ch. 420 of the state of Kansas), to sections 19 and 20 of the act relating to wills (Secs. 7956, 7957, Gen. Stats.



1901), by which such order may be contested in a civil action in the district court brought within three years after the refusal to probate; the remedy provided by such amendment being held merely cumulative: *In re Durant's Will*, 89 Kan. 347, 131 Pac. 613.

It is not error for the lower court to grant a change of judges. Whether respondent was or was not entitled to such change is immaterial, since the case is tried *de novo* in the supreme court. It can not be assumed that the judge from whom the case was transferred would have reached a different conclusion from that reached by the judge to whom it was assigned: *Ingersoll v. Gourley*, — Wash. —, 139 Pac. 208.

Where the evidence was conflicting upon the issue as to the mental capacity of the testator when he executed the codicil, this court must leave the matter where the trial court left it by its finding: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

An objection for want of signature or verification to a petition to set aside the probate of a will can not be raised for the first time on appeal: *Scott v. McGirtt*, — Okla. —, 139 Pac. 519.

(2) **Notice of appeal.** The notice of appeal by the executor from such order is not rendered ineffectual because he describes himself therein as the "executor of the estate" of the testator, instead of the "executor of the will": *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

(3) **Settlement of statement.** When a contest of a will of a deceased person offered for probate for alleged forgery has been sustained, and proponent has moved for a new trial and improper matter has been incorporated in the settled statement, an application of contestants made under section 473 of the Code of Civil Procedure within six months after the settlement of the statement to set it aside and to amend the statement on the ground that it does not truly represent the case, was properly granted in order to make it speak the truth. It was the duty of the trial court to see that the



settled statement, which the appellate court is called upon to review, comports with verity: *Estate of Thomas*, 155 Cal. 488, 101 Pac. 798.

(4) **Jurisdiction on appeal.** On a contest of the probate of a will an objection that a medical witness, who had testified to the unsoundness of mind of the testatrix, was incompetent, under subdivision 4 of section 1881 of the Code of Civil Procedure, for the reason that his information was acquired while treating her as his patient, can not be availed of on appeal, unless objection to the testimony of the witness was specifically taken on that ground in the trial court, either by objections to the questions asked the witness, or by motion to strike out his evidence after the facts were elicited showing the incompetency: *Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

(5) **Record.** On an appeal from an order dismissing a petition to revoke the probate of a will, on the ground that it was filed more than one year after the will was admitted to probate, where the record contains no bill of exceptions showing the evidence taken and considered by the court upon the hearing of the motion to dismiss, the only question that can be considered is whether or not the record, or what may be considered as the judgment roll, is sufficient to sustain the order: *Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

The record on such appeal sufficiently shows that a motion for new trial was made where the transcript contains a duly certified copy of a minute entry showing that a motion for a new trial was denied, and the statement discloses that it was prepared and settled to be used on the executor's proposed motion for new trial: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

On an appeal from an order denying a motion for new trial of a contest of a will after probate, it is not essential that the papers constituting the judgment roll or the order denying the motion should be authenticated by being embodied in a bill of exceptions. The judgment roll in such case should include at least the petition for revocation of the probate, the answer thereto, the verdict of the jury and the judg-



ment, and it is sufficient, under section 953 of the Code of Civil Procedure, if such papers are authenticated by the clerk's certificate: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

Where the papers constituting the record upon appeal are the petition to revoke the probate, with date of filing, May 7, 1908, the motions of the parties to dismiss the petition, and the order of dismissal, which recites or finds that the will was admitted to probate by an order "duly given and made on the 4th day of May, 1908," the record shows on its face that the petition to revoke the probate of the will was filed more than one year after the will was admitted to probate, which is forbidden by the terms of section 1327 of the Code of Civil Procedure: *Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

Where the transcript does not show the date of the entry of the order admitting the will to probate in the minutes of the court, it must be presumed upon appeal in the absence of any evidence to the contrary, that the clerk performed his official duty and entered the order in the minutes of the court immediately after it was made on the same day: *Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

Where the transcript also sets forth the order admitting the will to probate, which recites that it was "done in open court this 4th day of May, 1908," and the certificate of the judge attached to the will bears the same date as to its probate, these papers afford ample evidence that the will was admitted to probate on that day, and that the proper record thereof is in the minutes of the court bearing that date: *Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

The recital in the order appealed from as to the date of the order admitting the will to probate is conclusive. It has the effect of a finding that the proofs made at the hearing showed that the will was admitted to probate on May 4, 1908: *Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

**(9) Review of verdict or findings.** On an appeal from a judgment refusing to revoke the probate of a will it was held that the findings in the issue of undue influence covered



all the material facts and were sufficient to support the judgment: *Estate of Daly*, 166 Cal. 225, 135 Pac. 953.

The verdict of the jury finding that the will was not executed as the result of undue influence or fraud held to be sustained by a great preponderance of the evidence: *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

Where the contest of the probate of a will is sustained on the ground of undue influence, a finding upon that issue is supported by the clear and positive testimony of interested and hostile witnesses of such a nature as to warrant the verdict, if the jury believed it to be true, even if the conflicting evidence for the proponent was preponderating. All questions of credibility of witnesses and of the weight of the testimony were exclusively for the jury and the trial court. The rule is the same in will contests as in other proceedings, and a verdict or finding in such a case will not be disturbed where there is a real and substantial conflict upon the issues of fact involved: *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598.

That there is no finding on an issue of fraud does not preclude consideration of evidence of fraud as bearing on an issue of undue influence: *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.

In the proceeding to revoke the probate of a will, the findings on the issue of undue influence cover all the material facts and are sufficient to support the judgment sustaining the probate: *Estate of Daly*, 166 Cal. 225, 135 Pac. 953.

In this case of a will contest the evidence is sufficient to justify a finding by the jury that the testatrix was of an unsound mind at the time of the execution of the will: *Estate of Strachan*, 166 Cal. 162, 135 Pac. 296.

In this case of a will contest the evidence is found sufficient to support a finding of undue influence exerted by the sole beneficiary under the will and her mother: *Estate of Strachan*, 166 Cal. 162, 135 Pac. 296.



If the facts proved to remove ambiguity from the language of a will are admitted or established without conflict, the justness of the application which the court made of those facts in its construction will equally, as a legal proposition, be the subject of review: *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166, 168.

Upon a review of the evidence it is held insufficient to sustain the findings of the jury that the testatrix, at the time of the execution of her will, did not understand its provisions, and that the will was executed as the result of undue influence exercised by the person nominated as executor and by one of the witnesses: *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762.

In reviewing, on appeal, an order granting a nonsuit on a contest of a will, in determining whether the evidence presented was sufficient to take the case from the jury, the entire evidence presented is to be viewed from a point most favorable to the contestant. Disregard is had of any contradictory evidence. All facts supporting the case of contestant must be taken as true and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

It is held, upon a review of the evidence, that there is nothing therein that is capable of doing more at the most than warranting a mere suspicion or surmise that undue influence may have been exerted in the matter of the execution of the will, and that it was insufficient to justify setting the will aside: *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

In this case on an appeal from a judgment setting aside a will on the ground of undue influence the findings and assignments of error were reviewed and held not to require a reversal: *Fairbank v. Fairbank*, — Kan. —, 139 Pac. 1011.

### 13. NO REVIEW IN EQUITY.

The general rule that equity will set aside judgments for extrinsic fraud has an exception in the case of decrees admitting wills to probate: *Stead v. Curtis*, 205 Fed. 439.



The fact that jurors in a probate proceeding were disqualified, or committed perjury to escape successful challenge, does not give a court of equity jurisdiction to set aside the judgment admitting the will to probate: *Stead v. Curtis*, 205 Fed. 439.



## CHAPTER III.

## PROBATE OF FOREIGN WILLS.

1. In general.
2. Jurisdiction of courts.
3. Effect of foreign judgment.
4. Instrument when not entitled to probate as such.
5. Issues to be determined.

1. **In general.** The article of the Code of Civil Procedure of the state of California (Secs. 1322-24), on probate of foreign wills, must prevail over all conflicting provisions as to all matters and questions arising out of the subject matter of such article. Under that article the executor named in a foreign will is entitled to letters testamentary and in the absence of an application by him letters must be granted "to any other person interested in the will," who applies for them, provided the applicant has the qualifications prescribed by the law for administrator: *Estate of Meier*, 165 Cal. 456, 132 Pac. 764.

The probating in the state of Washington of the will of a nonresident leaving property in that state is not ancillary to such proceedings in the state of his domicile: *Alaska etc. Co. v. Noyes*, 64 Wash. 672, 117 Pac. 495.

A will executed in strict conformity with the laws of the state in which it was executed but such execution did not comply with some nonessential formalities as to execution required by the laws of the state in which lands devised by the will were situate is valid and entitled to probate in the latter state: *Wattenbarger v. Wattenbarger*, 39 Okla. 531, 135 Pac. 1142.

The probate of a will in one state does not establish its validity as a will devising real estate in another state unless the laws of the latter permit it so that until the provision of the law of Colorado on the subject be complied with it can not be assumed that a will admitted to probate in another



state is valid for the purpose of devising real estate in Montana: Sayre v. Sage, 47 Colo. 559, 108 Pac. 163.

Where a testator died leaving property in two states in one of which he had his domicile and his will was probated there it is also necessary that the will be probated in the other state in order to administer upon the property situate therein: State v. Superior Court, 52 Wash. 149, 100 Pac. 199.



## CHAPTER IV.

## CONTEST AFTER PROBATE.

1. In general.
2. Parties.
3. What motion is a contest.
4. Time. Limitation of action.
  - (1) In general.
  - (2) Effect of amending petition.
  - (3) Delay in prosecuting contest.
5. Estoppel to contest.
6. Intervention.
7. Pleadings.
  - (1) In general.
  - (2) Sufficiency of petition.
  - (3) Amendment of.
8. Issues.
9. Trial of issues by jury.
10. Burden of proof.
11. Evidence. Presumption.
12. Heirs and insane persons as witnesses.
13. Effect of revocation of probate.
14. Costs in contest after probate.
15. Nonsuit and dismissal.
16. Collateral attack.
17. Right to maintain second contest.
18. Contest of foreign will.
19. Appeal.
  - (1) In general.
  - (2) Right of appeal.
  - (3) Findings.
  - (4) Consideration on appeal.

## 2. PARTIES.

Under the provisions of section 5318, Rev. Codes of Idaho, when a will has been admitted to probate any person interested in the same may at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing containing his allegations and praying for revocation of the probate: *Hagan v. Sullivan*, 24 Ida. 19, 132 Pac. 106.



Failure to issue citation to executor or administrator with will annexed within one year as provided by Code Civ. Proc., Sec. 1328, and Stats. 1907, p. 314, Ch. 250, necessitates dismissal of proceedings in absence of general appearance: *In re Hite's Estate*, 155 Cal. 390, 101 Pac. 8.

It is not necessary for movant to serve notice on all parties who might be affected by petitioner's contest, it being sufficient if petitioner himself is served: *In re Hite's Estate*, 155 Cal. 390, 101 Pac. 8.

Administrator with will annexed, who appeared only for purpose of moving to dismiss petition for revocation for want of citation, held not to have appeared generally though he did not designate his appearance as special: *In re Hite's Estate*, 155 Cal. 390, 101 Pac. 8.

### 3. WHAT MOTION IS A CONTEST.

#### REFERENCES.

As to what amounts to a contest within forfeiture clause in will, see note 21 L. R. A. (N. S.) 953, 39 L. R. A. (N. S.) 953.

### 4. TIME. LIMITATION OF ACTION.

(1) **In general.** Under section 1328 of the Code of Civil Procedure, as amended in 1907, a petition for the revocation of the probate of a will and all proceedings based thereon, will be dismissed unless a citation be issued to the executor of the will or to the administrator with the will annexed within one year after such probate: *Estate of Hite*, 155 Cal. 390, 101 Pac. 8.

(3) **Delay in prosecuting contest.** Revocation proceedings commenced more than one year after admission of will to probate held properly dismissed (Code Civ. Proc., Sec. 1327): *In re Parsons's Estate*, 159 Cal. 425, 114 Pac. 570.

### 7. PLEADINGS.

(2) **Sufficiency of petition.** A petition to revoke the probate of a will is sufficient if it alleges that at the time the



testatrix made and subscribed the will she was not "of sound mind or memory, or in any respect capable of making a will." It is not necessary to aver more particularly the character of the insanity. Such a petition is not demurrable for failure to state facts sufficient to constitute a contest for revocation of the will: *Estate of Kilborn*, 158 Cal. 593, 112 Pac. 52.

Petition alleging that testatrix was not of sound mind when she made will held sufficient against demurrer for want of sufficient facts: *In re Kilborn's Estate*, 158 Cal. 598, 112 Pac. 52.

Petition to revoke probate alleging that at time of making of will testator "was not of sound mind or memory, or in any respect capable of making a will," held to sufficiently allege ultimate fact, it not being necessary to aver character of insanity: *In re Kilborn's Estate*, 158 Cal. 593, 112 Pac. 52.

(3) **Amendment of.** In a proceeding to revoke the probate of a will and a codicil, in which a judgment is rendered upholding the will, the allowance of an amendment setting up a new ground of contest directed to matters solely affecting the will is without prejudice to the proponent, notwithstanding such amendment is made more than one year after probate: *Estate of Ricks*, 160 Cal. 468, 117 Pac. 539.

## 9. TRIAL OF ISSUES BY JURY.

In an action to revoke the probate of a will on the ground of undue influence, if it be conceded that appellants were entitled to show that the persons charged with exercising undue influence entertained feelings of hostility toward the contesting relatives, such evidence could not have availed to make a case sufficient to go to the jury in the absence of anything tending to prove that undue influence has in fact been exercised: *In re Packer's Estate*, 164 Cal. 525, 129 Pac. 778, 781.



## 10. BURDEN OF PROOF.

The burden to prove intestacy, where a will has been established, is upon the one alleging it. Rule applied in case of intestacy set up against intervening executor: *Boye v. Andrews*, 10 Cal. App. 491, 102 Pac. 551.

## 12. HEIRS AND INSANE PERSONS AS WITNESSES.

In a contest by the daughter of the testator to revoke the probate of the codicil of a will in which the son was the chief beneficiary, the trial court did not err in not requiring an explanation from the son, where there was no showing by the contestant demanding such explanation; but the evidence shows that the son had nothing to do with procuring his father's signature to the codicil, either before or when it was placed there: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

## 13. EFFECT OF REVOCATION OF PROBATE.

### REFERENCES.

Revocation of probate as a termination of appointment of administrator with the will annexed, see note 21 L. R. A. (N. S.) 975.

## 14. COSTS IN CONTEST AFTER PROBATE.

The test of the executor's right to have the costs of his unsuccessful attempt to prevent revocation of probate paid out of the estate is whether he has acted in good faith: *Estate of Jones*, 166 Cal. 147, 135 Pac. 293.

The discretion of the court, under section 1332 of the Code of Civil Procedure, in the allowance of costs and counsel fees upon a proceeding to revoke the probate of a will, can not be exercised in advance of a final disposition of the contest on appeal: *Estate of Jones*, 166 Cal. 147, 135 Pac. 293.



## 15. NONSUIT AND DISMISSAL.

In a proceeding to revoke the probate of a will on the grounds of undue influence and fraud, and for the alleged mental incompetency of the testator, in which a motion for nonsuit was granted at the close of the contestant's case, it was held that the evidence was insufficient to establish either of such grounds of contest, or to warrant the submission of the question to the jury: *Estate of Packer*, 164 Cal. 525, 129 Pac. 778; see also *Estate of Purcell*, Id. 300, 128 Pac. 932.

In considering the evidence before the court on a motion for nonsuit in proceedings for the revocation of the probate of a will, the entire evidence presented is to be viewed from a point most favorable to the contestant, disregard is to be had of contradictory evidence, all facts supporting the case of the contestant must be taken as true, and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proved in his favor: *Estate of Hodgdon*, 23 Cal. App. 415, 138 Pac. 111.

The contest instituted by the petition to revoke the probate having been filed more than a year after the admission of the will to probate was properly dismissed, and the order dismissing it must be affirmed: *Estate of Parsons*, 159 Cal. 425, 114 Pac. 570.

## 17. RIGHT TO MAINTAIN SECOND CONTEST.

Although the contestant of a will was not barred by the order admitting the will to probate from instituting a new contest at any time within one year after the alleged will was admitted to probate, it can not be held, and indeed is not claimed, that she is not substantially prejudiced by the disregard of her contest before probate. One result of such contest, if successful, would have been to prevent the petitioner for probate from acting as executor without bonds, and, if appointed administrator of the estate of deceased, he would be required to give security for the faithful performance of his duties. As the owner of half of the property



of the decedent if the will was invalid, contestant was substantially interested in having proper security for the discharge of his duties by the person administering the estate. She would have no such security under the order appealed from during the pendency of any contest instituted by her after probate: *In re Mollenkopf's Estate*, 164 Cal. 576, 129 Pac. 997.

### 19. APPEAL.

(3) **Findings.** Where a probated codicil to a will was contested upon petition of a daughter of the testator to revoke the probate thereof for unsoundness of mind as well as upon other grounds, and the court found that when the codicil was executed the testator was of sound and disposing mind, it is held that though there was evidence that he was then seventy-nine years old, was growing weaker physically, and that there was a gradual impairment of his memory and mental faculties, yet there was other evidence to show his testamentary capacity at that time, and that, as soundness of mind is to be presumed, and as the burden on the contestant to show unsoundness of mind at that time was not sustained, the finding of the court is sufficiently supported: *Estate of Weber*, 15 Cal. App. 224, 114 Pac. 597.

(4) **Consideration on appeal.** Defendant in suit to revoke probate held not in position to complain of failure of court to submit to jury any issues except those relating to undue influence, ruling being in his favor: *In re Kilborn's Estate*, 158 Cal. 593, 112 Pac. 52.



## CHAPTER V.

## PROBATE OF LOST OR DESTROYED WILLS.

1. Pleading destruction or loss.
2. Character of evidence required.
3. Proof of execution and contents.
4. Presumption incident to loss or destruction.
5. When presumption as to revocation is overcome.
6. Burden of proof.

**2. Character of evidence required.** Under the statute of the state of Washington providing that in proceedings for the establishment of lost or fraudulently destroyed wills the provisions of the will must be clearly and distinctly proved by at least two credible witnesses, each of such witnesses must be able to testify to the contents of the will from his own knowledge: *In re Needham's Estate*, 70 Wash. 229, 126 Pac. 430.

When the will of a testatrix attested by two witnesses was accidentally destroyed by fire in the San Francisco public calamity of April 18, 1906, without the knowledge or assent of the testatrix, it was not revoked thereby; nor is it essential to the probate of the will that all of its provisions must be distinctly proved by both witnesses, but independent portions of the will clearly identified by both of them must be admitted to probate under the amendment of 1907 to section 1339 of the Code of Civil Procedure, while as to other independent parts of the will as to which the witnesses have disagreed, there can be no probate, and an intestacy must be declared: *Estate of Patterson*, 155 Cal. 626, 102 Pac. 941, 132 Am. St. 116.

Where a will destroyed in the great conflagration of San Francisco was admitted to probate under section 1339 of the Code of Civil Procedure, the necessary finding that the contents of the will were proved by two credible witnesses was unsupported, where the only credible witness was one who drew the will and knew its contents, and was qualified to prove them by parol, and the only other witness to its con-



tents was that of one who had never seen or read the will, but had merely heard it or a copy of it read to her by the one who drew the will: *Estate of Guinasso*, 13 Cal. App. 518, 110 Pac. 335.

Stats. 1907, p. 122, Ch. 100, permitting will to be proved where destroyed in testator's lifetime by public calamity, held applicable to will of testator who died before its enactment: *In re Patterson's Estate*, 155 Cal. 626, 102 Pac. 941, 122 Am. St. 116.

Any substantial provision of destroyed will may be proved and admitted where complete and independent of the other provisions which can not be proved, where validity and operation of parts proved are unaffected by unproven ones: *In re Patterson's Estate*, 155 Cal. 626, 102 Pac. 941, 132 Am. St. 116.

Rule not changed by Code Civ. Proc., Sec. 1339, requiring provisions of destroyed will to be clearly proved by at least two credible witnesses: *In re Patterson's Estate*, 155 Cal. 626, 102 Pac. 941, 132 Am. St. 116.

Disposition of personalty held not distinctly proved by two witnesses where attesting witnesses disagreed as to whether money was given as part of residue or as specific legacy: *In re Patterson's Estate*, 155 Cal. 626, 102 Pac. 941, 132 Am. St. 116.

Under Code Civ. Proc., Sec. 1339, requiring provisions of lost or destroyed wills to be clearly and distinctly proven by at least two credible witnesses, testimony of one who had personal knowledge and of another who had merely heard him read will or a copy is insufficient: *In re Guinasso's Estate*, 13 Cal. App. 518, 110 Pac. 325.

#### REFERENCES.

The subject of the probate of lost or destroyed wills is dealt with in a note to the case of the *Estate of Patterson*, 132 Am. St. 127.

May the part of a lost or destroyed will which can be established be admitted to probate where there are other portions that can not be established, see 26 L. R. A. (N. S.) 654.



## CHAPTER VI.

## PROBATE OF NUNCUPATIVE WILLS.

## I. Appeal.

## PROBATE OF NONINTERVENTION WILLS.

There are two methods of probating wills in the state of Washington. One is where the executor executes the will, subject to the control of the court, until the estate has been settled and the property distributed. The other method is that provided by section 6196 of the code of that state (2 Ballinger's Ann. Codes & Stats.), which provides that: "In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided therein, and that letters testamentary or of administration shall not be required, and where it also appears to the court, by the inventory filed and other proof that the estate is fully solvent, which fact may be established by an order of the court on the coming in of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will, and to file a true inventory of all the property of such estate in the manner required by existing laws. And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the said last will and testament shall so provide": *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 256.



# **PART XVII.**

## **COMMUNITY PROPERTY AND SEPARATE PROPERTY.**

### **CHAPTER I.**

#### **COMMUNITY PROPERTY AND SEPARATE PROPERTY.**

- 1. Community property.**
  - (1) Derivation of system.
  - (2) What is community property.
  - (3) If husband dies first, effect of.
  - (4) If wife dies first, effect of.
  - (5) Succession of widow.
  - (6) Same. Succession by children and others.
  - (7) Payment of debts.
  - (8) Distribution of. Conclusiveness.
  - (9) Administration of. In Washington.
  - (10) Power of husband over.
  - (11) Effect of husband's declaration as to.
  - (12) Effect of taking title in wife's name.
- 2. Separate property.**
  - (1) Defined.
  - (2) Distribution.
  - (3) What law governs.
  - (4) Married woman's rights.
  - (5) Effect of husband joining in mortgage.
  - (6) Improvements.
  - (7) Commingling of funds.
  - (8) Effect of taking title in joint names.
  - (9) Change of character of.
  - (10) Estoppel.
  - (11) Trust in, by husband.

#### **1. COMMUNITY PROPERTY.**

**(1) Derivation of System.** The relation of husband and wife as to their property under the community system is somewhat in the nature of a partnership, there being usually partnership property and separate property of the copartners: *Lynam v. Vorwerk*, 13 Cal. App. 507, 110 Pac. 355.

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(2) **What is community property.** The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community where both are equal, and that property acquired during marriage by community funds or the labor and industry of either spouse, is the community property of the husband and wife and the presumption in all doubtful cases is strongly in favor of treating that which either spouse may own as community property. It is true that during the coverture the personal property belonging to the community may be disposed of by the husband only, but it is equally true that no sale or incumbrance of the real estate may be made by the husband without the consent of the wife: *La Tourette v. La Tourette*, — Ariz. —, 137 Pac. 428.

Under the community property laws of the state of Idaho whenever, after marriage, the husband purchases real estate in that state, a *prima facie* presumption arises that such property is community property, but such presumption may be overcome by the husband assuming the affirmative and burden of proof and showing as a matter of fact that such property was purchased with his separate estate: *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.

Under the statutes of the state of Idaho (Secs. 2680, 3060, Rev. Codes) all property acquired after marriage by either husband or wife not defined by Secs. 2676 and 2679 as the separate property of the husband or wife, is community property: *Kohuy v. Dunbar*, 21 Ida. 258, 121 Pac. 544.

Where a husband purchased land while living apart from his wife and sold it as a single man, and the wife was afterwards granted a divorce, she can not claim a half interest therein on the husband's death, the statutes of descents and distributions giving such interest only where the marriage subsists at the husband's death: *Kessinger v. Schrader*, 79 Kan. 23, 98 Pac. 236.

Even though, strictly speaking, there is no "community property" when there has not been a valid marriage, the



courts will, in dividing gains made by the joint efforts of a man and woman living together under a voidable marriage which is subsequently annulled, apply, by analogy, the rules which would obtain with regard to community property where a valid marriage is terminated by death of the husband or by divorce. The apportionment of such property between the parties, not being provided by any statute, should be made on equitable principles, and the amount to be allotted to her is to be determined by the exercise of the sound discretion of the trial court: *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441.

In an action by the woman, after the annulment of the marriage, to recover her portion of the property accumulated by the parties while the marriage was in existence, the court will not attempt to adjust their respective rights in proportion to the amount each contributed thereto: *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441.

The judgment in the action annulling the marriage, in which no property rights of the parties were in issue or determined, does not estop the former wife from subsequently maintaining an action to recover an appropriate portion of the property accumulated by them during the existence of the marriage: *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441.

In such action, a finding that the question of property rights was not presented by the pleadings in the annulment suit, and that no disposition of property was made or attempted to be made by the judgment in that suit, is conclusive on appeal: *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441.

Either spouse may hold the legal title to community property; and where land is acquired during coverture with community funds, although deeded to the wife, such property, unless made the subject of a gift from a husband to his wife, constitutes a part of the community estate of the marital relation: *In re Carlin*, 19 Cal. App. 168, 124 Pac. 868.

Where land is conveyed to a married woman by an instrument in writing, the presumption is, under section 164 of



the Civil Code, that the title vested in her as her separate property. Evidence, however, that the property was purchased and paid for out of community funds, that it was purchased for and used as the family home, without surrender of exclusive possession to the wife, that all business was transacted by the husband and none by the wife; that in the case of other lands, title to which stood in the name of the wife, the husband made the contracts for their sale and that the wife made a deed pursuant thereto; and that where promissory notes were taken in the name of the wife, the moneys for which the notes were given were paid over by the husband out of the community funds, and when payments were made on the notes they were made to the husband and receipted for by him, is sufficient to sustain a finding that the land was community property: *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

Subsequent to the execution of such deed to the wife, she, in pursuance of the directions of her husband, took a deed to the property drawn by him, from herself as grantor, to him, as grantee, and acknowledged it before a notary, by whom she was instructed that in order to vest title in her husband it would be necessary for her to deliver the deed to him, but that it was not necessary to have it recorded. The notary further instructed her that if so delivered and not recorded, and her husband died first, she could destroy the deed and the record title would stand in her name. She gave the deed to her husband, who informed her that she had correctly obeyed his instructions. He retained possession of the deed, did not place it of record, and upon his death it was destroyed by his wife. Held, that the evidence was sufficient to show a delivery of the deed by the wife, with intent to divest herself of her dominion and control over the property beyond power of recall, and to immediately vest her husband with title to it: *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

Personal property acquired by the spouses during coverture, and not by gift, devise, or descent, although standing in the name of the wife, will be deemed to be community property, when it appears that the husband attended to all busi-



ness and maintained to his death the absolute dominion and control of the property in all its phases; that his wife was utterly ignorant of and unversed in business, and that the same was acquired with community property: *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

It is held, upon a review of the evidence, that a purported bill of sale of such personal property from the husband to his wife was never delivered to her: *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

If the property was community property, the legal title remains in the husband, notwithstanding the fact that the deed was taken in the name of the wife. The whole title, both real and equitable, at once vests in the husband by means of the deed to the wife: *Osborn v. Mills*, 20 Cal. App. 343, 128 Pac. 1009.

The nature of the property as to whether or not it is community property is to be determined from the nature of the transaction without reference to who retains the title: *Osborn v. Mills*, 20 Cal. App. 343, 128 Pac. 1009.

It is undoubtedly the rule that all property acquired by either spouse during the existence of the marriage is presumed to be community property, and that the burden of overcoming the presumption by clear and satisfactory evidence rests upon the party claiming that the property is separate: *In re Niccoll's Estate*, 164 Cal. 368, 129 Pac. 278, 279.

Property acquired by a husband during coverture is presumed to be community property, in the absence of a showing that it was acquired by gift, bequest, devise or descent, or was purchased with his separate property; but this presumption is rebuttable: *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690.

In determining whether the property acquired by a husband was separate or community, regard should be had to his equitable status as purchaser, not simply to the technical

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mode by which the legal title came to be vested in him: *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690.

In general, property acquired during the existence of the community is presumed to be community property, though possessed and controlled by the husband: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

Property acquired after marriage with community funds is community property: *Fulkerson v. Stiles*, 156 Cal. 703, 105 Pac. 966; *Lynam v. Vorwerk*, 13 Cal. App. 501, 110 Pac. 355.

If property is acquired by wife by purchase with community funds, or in exchange for other community property, it is not accumulated in sense of Civil Code, Sec. 169, whereby property accumulated belongs to wife's separate estate: *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

Damages recovered for injury to the wife is community property: *Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328.

Right to recover damages for breach of contract to carry passenger safely to destination, when acquired by husband or wife, or both, after marriage, is community property. Civil Code, Sec. 164: *Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328.

Community estate may be vested in either spouse, and whether property so vested is community or separate is to be determined from nature of transaction in which it was acquired. Any evidence is admissible to overcome presumption pronounced by Civil Code, Sec. 164, amended by Stats. 1889, p. 328: *Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806.

#### REFERENCES.

As to what is community property, see note 126 Am. St. 99.

Profits accruing during marriage in connection with property belonging to separate estate of either spouse as community property, see note 31 L. R. A. (N. S.) 1092.



**(3) If husband dies first. Effect of.** Under the provisions of section 5713, Revised Codes of Idaho, on the death of the husband one-half of the community property goes to the wife subject to the community debts and the other half is subject to the testamentary disposition of the deceased husband: *Kohny v. Dunbar*, 21 Ida. 258, 121 Pac. 544.

Upon the death of a wife intestate, community property passes one-half to the husband and one-half to the legitimate issue of her body, the husband's interest becoming his separate property: *Duvall v. Healy Lumber Co.*, 57 Wash. 446, 107 Pac. 358.

Under section 1401 of the Civil Code, providing that upon the death of the wife the entire community property, without administration, belongs to the surviving husband, the husband does not take such property upon the death of the wife by succession, but he holds it all from the moment of her death as though acquired by himself: *Estate of Klumpke*, 47 Cal. Dec. 390, 139 Pac. 1062.

**(4) If wife dies first. Effect of.** Under the provisions of section 5713, Revised Codes of Idaho, on the death of the wife one-half of the community property goes to the husband subject to the community debts and the other half is subject to the testamentary disposition of the deceased wife: *Kohny v. Dunbar*, 21 Ida. 258, 121 Pac. 544.

**(5) Succession of widow.** The one-half interest which, under the laws of Idaho, the wife receives from the community property upon the death of her husband comes to her in her own right by reason of the death of the community agent and her survival of the dissolution of the community partnership: *Kohny v. Dunbar*, 21 Ida. 258, 121 Pac. 544.

**(6) Succession by widow. Succession by children and others.** Where real property was acquired from the government by a husband during marriage it was community property and hence on the dissolution of the community by the death of the husband, the property passed without probate proceedings or other legal action—one-half to the widow



and the other half to the children of the marriage: *Molina v. Ramirez*, — Ariz. —, 138 Pac. 17.

(7) **Payment of debts.** Family expenses are *prima facie* presumed to have been paid from community funds: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

(8) **Distribution of. Conclusiveness.** Where on the death of a husband the probate court assigned community real property worth less than \$2000 to the widow and minor children, the law vested title to the property—one-half to the widow and the other half in the children—without reference to the community character of the property, as provided by the Civil Code of Arizona, 1901, par. 1729: *Molina v. Ramirez*, — Ariz. —, 138 Pac. 17.

Where real property worth less than \$2000 was the only asset of a decedent's estate the probate court, after payment of the expenses of the last illness and funeral charges and the expense of administration, was required by Civil Code of Arizona, 1901, par. 1730, to assign the property to the widow and minor children for their use and support, after which there could be no further administration proceedings unless further estate was discovered: *Molina v. Ramirez*, — Ariz. —, 138 Pac. 17.

A husband having died leaving land worth less than \$2000 as his estate, and the probate court having assigned the same to the widow and minor children as required by Civil Code of Arizona, 1901, par. 1730, it had no subsequent jurisdiction to authorize the administratrix to sell the land, and an order and judgment attempting to confer such authority was void: *Molina v. Ramirez*, — Ariz. —, 138 Pac. 17.

A husband died leaving a widow and minor children, and 160 acres of community property, which was the only asset of his estate. This land was worth less than \$2000 and on application by the widow, who was administratrix, it was awarded to her and the minor children for their use and support, as authorized by Civil Code of Arizona, 1901, par. 1730, notwithstanding it would have vested in them to the same extent without any such order because of its community



character. Thereafter the administratrix applied for and was granted an order to sell the land, which order was void for want of jurisdiction, and under this issue she sold the land, executing a deed describing the grantor as administratrix. Held that such deed was not void, but the word "administratrix" could be regarded as mere descriptio personae, and the deed upheld as a conveyance of the widow's interest in the land: *Molina v. Ramirez*, — Ariz. —, 138 Pac. 17.

**(9) Administration of. In Washington.** Upon the death of either the husband or the wife, the entire estate and not the portion owned by the deceased is subject to probate: *F. T. Crowe Co. v. Adkinson Co.*, 67 Wash. 420, 121 Pac. 843.

Where an administration is had of the community property the same should be of the whole thereof and not merely of the half interest of the decedent: *Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 17.

**(10) Power of husband over.** Under the provisions of section 2686, Revised Codes of Idaho, the husband has the management and control of the community property with the like absolute power of disposition as he has of his separate property: *Kohny v. Dunbar*, 21 Ida. 258, 121 Pac. 544.

Under the community property law of the state of Idaho the wife has an equal interest and ownership with the husband in community property and the only particular in which their rights differ is in the fact that the statute constitutes the husband the managing and sales agent and trustee of the community partnership and authorizes him to sell and pass title to such property and exercise absolute control over the same: *Kohny v. Dunbar*, 21 Ida. 258, 121 Pac. 544.

A husband may, in good faith, make a gift of land owned by him in the state of Kansas, of which his wife has made no conveyance, without defrauding her, if she has never resided in that state, but to make the gift effective to bar her statutory right accruing after his death, he must consummate it by a conveyance, and the grantee must not be guilty of



actual fraud in obtaining it: *McKelvey v. McKelvey*, 79 Kan. 82, 99 Pac. 238.

To constitute a valid gift of community property from the husband to the wife, the delivery of the deed must be made with the intention of making a gift and passing title, a mere delivery of property without such intent passing no title: *In re Carlin*, 19 Cal. App. 168, 124 Pac. 868.

The earnings of the wife during marriage and while living with her husband, as community property, are subject to the control of the husband; but the husband may relinquish to the wife his interest in her earnings, and when he does so, such earnings become the separate property of the wife: *Larson v. Larson*, 15 Cal. App. 531, 115 Pac. 340.

Ownership of community property is placed in husband by law: *Fulkerson v. Stiles*, 156 Cal. 703, 105 Pac. 966.

Dispositions not in fraud of the rights of the wife by the husband are valid: *Jacobs v. All Persons Interested, etc.*, 12 Cal. App. 163, 106 Pac. 896.

Prior to amendment of Civil Code, Sec. 172, by Stats. 1891, Ch. 220, providing that husband can not make gift of community property nor transfer same without his wife's consent, husband could convey community property without his wife's written consent, and amendment is not retroactive and does not deprive him of his power to dispose of, without his wife's consent, community property acquired prior to such date: *Clavo v. Clavo*, 10 Cal. App. 447, 102 Pac. 556.

Community property may be subject to gift from husband to wife: *Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806.

Complaint by surviving husband for community real estate standing in name of deceased wife, alleging that she took title for benefit of community, held to negative any presumption of gift and to render evidence controverting such prima facie fact admissible: *Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806.

Under such allegations, court must find on issue of gift: *Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806.



Wife can not elect form of action in which damages for injury shall be recovered: *Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328.

Wife can not alone execute release or satisfaction of right of action for injuries sustained because of violation of contract to carry her safely: *Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328.

The husband is at least a necessary party to an action for community property, and a defense against him is a defense to the action. Code Civ. Proc., Sec. 870: *MacLeod v. Moran*, 11 Cal. App. 622, 105 Pac. 932.

In action for damages for injury to wife: *Basley v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 111 Pac. 530; *Justis v. Atchison etc. R. Co.*, 12 Cal. App. 639, 108 Pac. 328. ✓

Where complaint discloses relation of husband and wife, wherefore husband is necessary party, objection shall be taken by demurrer. Code Civ. Proc., Sec. 430: *MacLeod Moran*, 11 Cal. App. 622, 105 Pac. 932.

Where husband's negligence contributes proximately to wife's injuries, recovery will not be permitted, since husband can not benefit by his own wrong, and recovery is community property: *Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 111 Pac. 530.

Since wife is in care of husband, his negligence is imputable to her: *Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 111 Pac. 530.

Evidence that husband could have given alarm and prevented collision of cars which took place while wife was dismounting held insufficient to show contributory negligence imputable to wife: *Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 111 Pac. 530.

An exception to the rule that the husband has control of community property is that the wife is necessary party to an action for injuries to her.



Right of action for false imprisonment of wife is community property, but wife is necessary party: *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12.

Failure of husband to take title to community property in name of his wife in accordance with his promise to do so is not fraud on wife unless done with fraudulent intent: *Clavo v. Clavo*, 10 Cal. App. 447, 102 Pac. 556.

**(11) Effect of husband's declaration as to.** In the administration of the estate of a testatrix of a will mutual in form executed by her and her husband, a declaration in the will that everything owned by them was community property is not binding on the court, but that question is to be determined by the court in accordance with the mode whereby the property was acquired: *Estate of Learned*, 156 Cal. 309, 104 Pac. 315.

In an action by the personal representative of a deceased husband, against his wife's estate, to quiet title to land which stood in the name of the wife, on the ground that it was community property, declarations of the husband, to the effect that it was unnecessary that he should make a will, that his wife had everything, and that he had given or had left everything to her, are but expressions of his belief as to what he had done or accomplished, and are not controlling in determining what in fact he had or had not done or accomplished: *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216.

**(12) Effect of taking title in wife's name.** Where property has been purchased with community funds and title taken in the name of the wife, a third person to whom the husband has attempted to make a conveyance of the property in question can not, on the theory that he is the equitable owner by virtue of his deed, compel the wife to execute a conveyance to him while he has never offered to pay any substantial part of the purchase price and has in fact only paid a small portion thereof: *Nolan v. Hyatt*, 163 Cal. 1, 124 Pac. 439.



The right of the husband to maintain an action to recover real property where the real property involved belongs to the community, although conveyance thereof has been made to the wife and no purchaser has acquired title thereof in good faith and for value, has been recognized by the supreme court of this state in a number of instances: *Osborn v. Mills*, 20 Cal. App. 343, 128 Pac. 1009.

Where a wife has been adjudged trustee of certain property for the benefit of the marital community, she has sufficient interest in the property standing in her name to warrant her in opposing the claim that a third person has become the owner in equity and that she be required to convey the legal title to him: *Nolan v. Hyatt*, 163 Cal. 1, 124 Pac. 439.

The plaintiff, notwithstanding the execution of the deed by the husband, could not become the equitable owner of the community property standing in the name of the wife, without the payment or tender of some substantial consideration therefor, and the wife, in the absence of anything in the record of the former action estopping her from showing that the plaintiff had not become such equitable owner, could show such want of consideration in opposition to his claim of equitable ownership: *Nolan v. Hyatt*, 163 Cal. 1, 124 Pac. 439.

When property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property under section 164 of the Civil Code; but this is a mere rule of evidence fixing the onus probandi in cases where the question of ownership is in litigation. Neither the wife nor her representative is bound to prove that the conveyance was a gift; but it devolves upon the husband to overcome the presumption by showing that it was not a gift. It is held that such burden was sufficiently sustained by the evidence of the husband that it was the intention to provide a home for both and not to give her the property, which, in the absence of any inconsistent testimony, is sufficient to support the conclusion of the trial court: *In re Carlin*, 19 Cal. App. 168, 124 Pac. 868.



The policy of permitting the presumption arising from a conveyance of real estate purchased with community funds to a married woman to be overthrown after the wife's death by evidence of an undisclosed intent on the part of the husband that it was not the subject of a gift, may well be questioned. It is the province of the legislature, however, and not of the courts, to determine questions of policy: *In re Carlin*, 19 Cal. App. 168, 124 Pac. 868.

In this action by a husband against the devisees of his deceased wife to quiet title to real property purchased in her name, the findings that the property was community property and purchased and paid for by money belonging jointly to the plaintiff and his deceased wife, are supported by the evidence: *Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534.

The testimony of the plaintiff was sufficient to overcome the presumption that the title to the property was vested in the wife as her separate property, or that he intended that the conveyance should operate as a gift to her: *Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534.

It is improper to permit the husband in such an action to testify that the funds from which the property was purchased was not the "separate property" of the wife, but such testimony is not prejudicial where the witness also testifies that the purchase money was earned by them during their coverture: *Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534.

Evidence that the wife executed deeds to the disputed property, and that she was the only party thereto is inadmissible, where the same were not executed in his presence or with his knowledge: *Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534.

Declarations of the deceased wife concerning a joint bank account of herself and her husband, tending to show that the latter had no interest therein, are self-serving and inadmissible: *Eaton v. Locey*, 22 Cal. App. 762, 136 Pac. 534.

Where in an action by a husband against his wife to establish that certain property held by her was community



property, the complaint counts upon an agreement whereby the plaintiff was to furnish money for the improvement of her separate property in consideration of the same becoming thereafter community property, and the answer denies the agreement and alleges a gift of the money, a finding against the agreement and that the money had been loaned to the defendant is outside of the issues and insufficient to support a personal judgment against her for the money loaned: *Simmons v. Simmons*, 166 Cal. 438, 137 Pac. 21.

Where husband purchased property with community funds and directed that deed be made to his wife with intent to make it her separate property, deed vested it as her separate property but intent to make it such was essential: *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308.

#### REFERENCES.

As to what is community property, see note in 126 Am. St. 99.

As to debts or claims for which community property is liable, see note in Ann. Cas. 1913A 319.

## 2. SEPARATE PROPERTY.

(1) **Defined.** Where land was acquired from the United States under the homestead laws by an applicant who had never been married when he filed thereon but who married before he made final proof and received patent and subsequently died intestate without having parted with the land, such land is separate and not community property: *Teynor v. Heible*, 74 Wash. 222, 133 Pac. 1.

A government homestead entry having been made on land and an equity earned therein prior to marriage the land is the separate property of the entryman under Sec. 2679, Rev. Codes of Idaho: *Humbird Lumber Co. v. Doran*, 24 Ida. 507, 135 Pac. 66.

When a husband purchases property with his wife's money, taking title in himself, contrary to her instructions, the property is not liable for his debts: *Gladstone Lumber Co. v. Kelly*, 64 Or. 163, 129 Pac. 764.



Where a man and woman lived together as husband and wife without being legally married and the woman died and an administrator was appointed of her estate and the man up to the time of an application for distribution permitted it to be regarded as community property and then claimed it as his separate property, held that as there was no marriage there could be no community and the man's claim was allowed but subject to payment of expenses of administration and of a guardian ad litem of an infant heir: *Sloan v. West*, 63 Wash. 623, 116 Pac. 273.

Where land in the state of California is purchased by the husband in the name of the wife, either with his separate funds or with community funds, the presumption arises that a gift of such land to the wife was intended; and under section 164 of the Civil Code, the presumption is that the title is thereby vested in the wife as her separate property. The burden to overcome such presumption rests upon any one interested in attacking the wife's title to produce competent evidence of sufficient weight to show that the husband did not intend such property as a gift to his wife: *Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815.

In the absence of evidence sufficient to overcome the title of the wife in the property originally acquired by her from her husband's funds, as her presumed separate estate, and in the absence of any further showing of the loss of such title, the presumption is that the proceeds of the sale of his original separate estate continued as her separate estate: *Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815.

Section 164 of the Civil Code provides that whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. This is merely a rule of evidence fixing the burden of proof in cases where the question of ownership is in litigation, and where property is purchased with community funds, but conveyed to the wife, the latter is not required to prove that it was a gift, but it devolves upon the husband to overcome the presumption by



showing that it was not a gift: *In re Carlin*, 19 Cal. App. 168, 124 Pac. 868.

Where community property is taken in the wife's name, whether or not it was intended as a gift by the husband to his wife is a question of fact to be determined by the trial court, and its conclusion, unless manifestly without sufficient support, will not be disturbed by an appellate court: *In re Carlin*, 19 Cal. App. 168, 124 Pac. 868.

It is held that the testimony of the widow supports her complaint, and fairly discloses that the property claimed was regarded by the spouses as the separate property of the wife, and is not only sufficient to preclude a nonsuit, but, if submitted on her testimony alone, would have supported a judgment in her favor: *Larson v. Larson*, 15 Cal. App. 531, 115 Pac. 340.

Under section 164 of the Civil Code, providing that whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property, where a gift by the husband to the wife is essential to the theory that the property conveyed to the wife is her separate property, such a gift on the part of the husband will be presumed: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

The mere acquirement of the possession of the wife's separate property by the husband and his subsequent management and control of the same, all with her consent, do not show any intent on the part of the wife to make a gift of the property to the husband or to change its status from separate to community property, but the presumption in such a case is that the property continues to be the wife's separate property, and that the husband holds it in trust for her and that under such circumstances it devolves upon him, claiming a gift or change in the status of the property, to show the same: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

A gift by a man to his wife of an undivided one-half of real estate becomes her separate property: *Lapique v. Geantit*, 21 Cal. App. 515, 132 Pac. 78.



Where a conveyance of separate property is made to a woman directly by her husband, or by a third person at his direction, the property becomes her separate estate: *Rauer's Loan & Collection Co. v. Berthiaume*, 21 Cal. App. 670, 132 Pac. 596.

Under section 164 of the Civil Code, providing that "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property," where a gift by the husband to the wife is essential to the theory that the property conveyed to the wife is her separate property, such a gift on the part of the husband will be presumed. Such presumption, as between the husband and wife, while only *prima facie*, is controlling, in the absence of evidence showing a contrary intention on the part of the husband: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

A woman may perform services for her husband under a contract with him for money, provided the service is for work outside of the family relation, and her wages become her separate property: *Moore v. Crandall*, 205 Fed. 689.

When a married woman borrows money upon the credit of her separate property, the money so borrowed is her own and not a part of the community assets: *Dyment v. Nelson*, 166 Cal. 38, 134 Pac. 988.

A yacht purchased with such borrowed money is the separate property of the wife, notwithstanding the husband joined in the giving of the notes for the loan, and title to the yacht was taken and registry made in his name: *Dyment v. Nelson*, 166 Cal. 38, 134 Pac. 988.

In this action by the purchaser of the yacht from the husband, who takes it in payment of a pre-existing debt, to establish his title thereto as against the wife, there is evidence sufficient to support the finding that the plaintiff knew of the wife's claim and the purchase of the property with her separate funds: *Dyment v. Nelson*, 166 Cal. 38, 134 Pac. 988.

In this action for a divorce evidence tending to show that certain real estate was paid for with community funds was



insufficient to sustain the finding of the trial court that the property belonged to the community, where the conveyance of the property was to her, and there was evidence that before and at the time of the marriage she had sufficient funds to purchase the property, and she testified positively that she purchased it with such money alone: *Lenniger v. Lenniger*, 47 Cal. Dec. 303, 139 Pac. 679.

Where real estate is conveyed to a married woman, a presumption arises that the title thereto is vested in her as her separate property. The burden is then upon the husband, who contends that the property belongs to the community, to overcome the presumption by clear and convincing evidence; and his surmise or belief that the property was purchased with community funds, based on his ignorance of the fact that the wife had any separate property, is insufficient to overcome the presumption: *Lenniger v. Lenniger*, 47 Cal. Dec. 303, 139 Pac. 679.

If a woman, while in partnership with a man, appropriates partnership funds, the money thus appropriated will not, upon their subsequent marriage, be regarded as community property: *Lenniger v. Lenniger*, 47 Cal. Dec. 303, 139 Pac. 679.

Where a rooming house is the separate property of a married woman, all the profits from its management by her do not constitute community funds: *Lenniger v. Lenniger*, 47 Cal. Dec. 303, 139 Pac. 679.

On this appeal in proceedings between the heirs of a husband and those of his wife to determine heirship to his estate, the probative facts in the finding are not inconsistent with the conclusion that the property was his separate property. There being no finding that the purchase price paid by him for the property was not his separate property, the appellate court can not, for the purpose of overthrowing the ultimate finding of the separate character of the property, read into the findings one to the effect that the purchase money was community property: *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690.



Sworn statements by the wife in her inventory of her husband's estate, and in her application for a homestead, that the property was his separate estate are evidence against her successors in interest: *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690.

The presumption of section 164 of the Civil Code, as it existed prior to 1889, that property conveyed to either husband or wife after their marriage, other than as a gift, was community property, is inapplicable to conveyances between themselves: *Estate of Klumpke*, 47 Cal. Dec. 390, 139 Pac. 1062.

The execution and delivery of a grant, bargain and sale deed by a husband to his wife of his separate property for an expressed consideration of \$10, constitutes a gift to the wife, where no consideration is in fact paid, notwithstanding the property continued thereafter to be occupied as the family residence and the husband paid the taxes and expenses of repairs on the property: *Estate of Klumpke*, 47 Cal. Dec. 390, 139 Pac. 1062.

In this proceeding between the heirs of a husband and those of his wife to determine heirship to his estate, the finding that a certain tract of land was his separate property, and not the property of the community, is a finding of fact, not a conclusion of law, and it has sufficient support in the evidence: *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690.

An allegation or finding that a person is the owner of certain property is none the less an allegation or finding of an ultimate fact, because the question of ownership depends upon the application of rules of law to the facts shown: *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690.

The same considerations apply to an averment or finding that certain property owned by a married person is separate or community property. The evidence from which this ultimate fact is determined is not to be set forth in a pleading nor need it be found by the court: *Estate of Hill*, 47 Cal. Dec. 131, 138 Pac. 690.



Under some statutes there is a presumption that property conveyed to a wife in writing is her separate estate, which presumption is conclusive in favor of purchasers or incumbrancers in good faith and for valuable consideration: *Farnum v. Kern Valley Bank*, 12 Cal. App. 426, 107 Pac. 568.

Under Code, Sec. 164, amended by Stats. 1889, p. 328, providing that property conveyed to married woman is presumed her separate property, law regards such property as her separate estate though consideration was paid out of community funds, and husband has burden to show that it was not gift: *Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806.

Where title to property acquired during coverture is at husband's request taken in name of wife, he has burden to overcome presumption created by Civil Code, Sec. 164, amended by Stats. 1889, p. 328, which is not done by proof of undisclosed intention but by acts and declarations at time: *Killian v. Killian*, 10 Cal. App. 312, 101 Pac. 806.

The presumption with regard to property conveyed to wife in her own name is overcome where it appears that the property was purchased with community funds and that the husband did not intend to give it to the wife: *Fulkerson v. Stiles*, 156 Cal. 703, 105 Pac. 966.

Where husband at time of his marriage had money invested in his business, it was his separate property and profits due to capital invested were separate property under Civil Code, Sec. 63: *Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488.

Property acquired by gift, devise, bequest, or descent, is not community property. (Civil Code, Secs. 162, 164): *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

Property purchased with the proceeds of a sale of separate property is separate property. Evidence held sufficient to show that land was purchased with money which was originally wife's separate property: *De Gotardi v. Donati*, 155 Cal. 109, 99 Pac. 492.

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If title by adverse possession is founded on presumed grant to wife, under Civil Code, Sec. 164, such grant raises presumption that it is wife's separate property: *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

Civil Code, Secs. 162-164, do not apply so as to render property acquired by adverse possession community property: *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

Civil Code, Sec. 169, declaring that earnings and accumulations of wife and of children, while living separate from her husband, are her separate property, by word accumulations clearly includes property acquired by adverse possession: *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

The separate character of an estate will not be affected by the fact that the husband borrows money on the property upon the representation that he owns it, nor is it affected by the fact that the husband purchases materials used for improvements thereon: *Farnum v. Kern Valley Bank*, 12 Cal. App. 426, 107 Pac. 568.

As a rule neither spouse has any interest in the separate property of the other. (Civil Code, Sec. 157): *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313. (See page 1740.)

**(3) What law governs.** Personal property acquired during coverture is governed and controlled by the law of the matrimonial domicile, and if the title thereto and property therein was vested in the husband under the law of the domicile, it will be presumed everywhere to be his property, and the same is true of any property of the wife under the law of the matrimonial domicile: *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.

Where husband and wife during coverture accumulated property in a state where the community law did not exist and where property accumulated and acquired during coverture vests absolutely in the husband and such property or the proceeds thereof is brought into the state of Idaho and there invested in real property, the property so acquired will be the separate property of the husband: *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.



Where no proof is shown to the contrary the presumption arises in the courts of Idaho that the community property law prevails in a sister state, the same as it prevails in Idaho: *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.

In inquiring into and ascertaining the law of a sister state with reference to the title and ownership of property acquired by husband and wife in that state during coverture, the courts of Idaho do not make such inquiry for the purpose of executing a foreign law in Idaho, but rather to ascertain the status of the foreign law as a probative fact in ascertaining and establishing the title and ownership of such property at the time it was brought into Idaho: *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.

If a husband and wife acquire personal property in one state, and then remove with the same into a state in which the community property law prevails, the law of the state where they lived when the property was acquired will govern as to whether it be separate or community property: *In re Niccoll's Estate*, 164 Cal. 368, 129 Pac. 278, 280.

Real property purchased in the state of California with money accumulated in the state of Illinois by a man and wife during their marriage is not community property, but the separate property of the husband, as there is not in the state of Illinois any such thing as community property: *Estate of Warner*, 47 Cal. Dec. 595, 140 Pac. 595.

Separate personal property enjoyed under the law of the domicile by one of the spouses at the time it was acquired is not lost by its investment in real property in another jurisdiction where a different law is in force: *Estate of Warner*, 47 Cal. Dec. 595, 140 Pac. 595.

#### REFERENCES.

Estoppel against married women is the subject of a note in 57 Am. St. 169.

(4) **Married woman's rights.** Under the statutes of the state of Idaho a married woman is given the absolute control of her separate property and estate and has the power



and right to contract with reference thereto and she may create a debt against herself personally when such debt is created for her own use and benefit and for the use or benefit of her separate estate: *McFarland v. Johnson*, 22 Ida. 694, 127 Pac. 912.

Under the laws of Colorado the husband has no vested right, inchoate or other, by reason of the marital relation, in the property belonging to his wife, and she holds an absolute legal estate in her real and personal property, whether owned at the time of marriage or acquired during coverture, as free from any common law right of her husband as if she were unmarried: *Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1126.

Where a levy is made to pay a judgment against the husband upon the proceeds of a grocery business, which business is claimed to be the separate property of the wife, evidence that the grocery was purchased by the wife on her own credit with the proceeds of the property inherited from relatives established the fact that the property is the separate property of the wife, and not subject to the payment of the debts of the husband: *Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263.

The finding of the trial courts that the property levied upon in such case is the property of the wife must be based upon clear and convincing evidence; but the sufficiency of the evidence is for the trial courts: *Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263, following *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357, and *Estate of Pepper*, 158 Cal. 619, 31 L. R. A. (N. S.) 1092, 112 Pac. 62.

Presumption as to character of property managed and conducted by husband is overcome by evidence of married woman engaging in business and that property in question was purchased with funds and the issues, rents, and profits derived from money owned by the wife before marriage or acquired afterward by gift or devise: *Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263.



The fact of the contribution to the business of the time and skill of the husband in managing and conducting a business which was purchased with the separate funds of the wife, and the fact that he joined his wife in the execution of notes concerned with the conduct of the business, in the absence of any agreement to that effect, does not give him any interest in the property: *Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263.

In action by a wife for the wrongful conversion of a fund claimed as her separate property for the debt of the husband contracted before marriage, the finding of the court in favor of the plaintiff is sufficiently supported by evidence tending to show that the fund converted was the product of a grocery business, purchased with her separate means, inherited from an aunt, and that her husband had no estate of his own, but merely held her general power of attorney to transact business for her, and that all dealings by him were upon her account and credit: *Oldershaw v. Matteson & Williamson Co.*, 19 Cal. App. 180, 125 Pac. 263.

Officials of the bank which made loans to the plaintiff were properly permitted to testify that in making said loans they recognized the plaintiff as the party borrowing the money and extended the credit to her alone. There was no prejudicial error in this ruling, particularly as it was shown that she was the only member of the marital community who possessed any estate: *Oldershaw v. Matteson & Williamson Co.*, 19 Cal. App. 180, 125 Pac. 263.

Neither the fact that the husband contributed all his time and skill in the conduct of the business owned by the wife nor that he joined his wife in the execution of notes given for money wherewith to make the purchase (assuming that he did), in the absence of any agreement to that effect, gave him any interest in the wife's property: *Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 180, 125 Pac. 263.

It is held that the record shows no facts which could estop the plaintiff from claiming the fund as her own as against a debt contracted by the husband before marriage, or tending to show any act on her part whereby she transmuted her



separate estate into community property, but that the execution of a general power of attorney to the husband is inconsistent with an intent to transmute her separate estate in such fund into community property: *Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 180, 125 Pac. 263.

Married woman may own, hold, and control her separate property as fully and completely as husband can. (Civil Code, Sec. 162): *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

This doctrine has been extended even to allowing one spouse to acquire the land of the other by adverse possession: *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

Wife may hold land adversely to husband: *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

When husband has left family, ceased to contribute to its support, and abandoned his property to use of wife for that purpose, public policy does not prevent her from acquiring same rights with respect to property left in her hands as if she were unmarried: *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

Wife can not acquire title to husband's land by adverse possession while they are living together and he remains head of family, since under Civil Code, Sec. 157, neither spouse can be excluded from other's dwelling: *Union Oil Co. v. Stewart*, 158 Cal. 149, 110 Pac. 313.

A wife's separate property is not ordinarily liable for her support, except when the community property fails and the husband fails to pay from his separate estate, but the wife may consent to the use of her separate estate to pay living expenses. (Civil Code, Secs. 174, 176): *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

**(5) Effect of husband joining in mortgage.** Money borrowed on the faith of the wife's separate estate is her separate estate in the absence of a showing to the contrary. The mere fact that the husband joined with the wife in a mortgage loan on her separate estate, at a time when he owned



no property, does not indicate that he owned any interest in the mortgage on the property, especially where it appears that such mortgage loan was paid mostly out of the rents and profits of the wife's separate estate, which were her separate property, and that the small residue was paid out of the proceeds of the sale of her separate estate: *Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815.

**(6) Improvements.** Where improvements are placed on property belonging to either the husband or the wife, although purchased with community funds, such improvements will follow the title to the property, and will belong to the party who owns the land: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

Where a husband deliberately constructs from community funds a building upon the separate property of his wife, in the absence of any sufficient agreement or undertaking to the contrary, as between him and her, the title to the building follows the title to the land, and is separate property of the wife, and neither he nor the marital partnership has any title to any portion of the property, either land or building: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

Such vesting of the title in the wife as her separate property is not affected by the fact that the husband received the rents from the building so constructed and placed them to his credit in a bank: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

**(7) Commingling of funds.** Where a contemporaneous sale was made of the wife's separate property, and of a lot belonging to the husband, and the proceeds of the sale of each was known, the mere fact that all of the proceeds were deposited alternatively in the names of the husband "or" wife did not of itself constitute evidence tending to disprove the presumption that the husband gave to the wife the property from the sale of which her part of such proceeds was derived; neither does such fact, standing alone, show that the wife intended to give to the husband any part of her interest in the land: *Carle v. Heller*, 18 Cal. App. 757, 123 Pac. 815.



The mere commingling of the funds on deposit belonging to the husband and wife does not render the interest of each party not clearly ascertainable. Where it appears that by investment a part of the proceeds of the wife's separate estate became vested in the husband, and the residue remained in the wife, she is entitled to the whole residue remaining in her as her separate estate, and no part thereof can be claimed by the heirs of the deceased husband: *Carle v. Heller*, 18 Cal. App. 577, 123 Pac. 815.

The commingling and loss of identity of the separate property, while a circumstance tending to show an agreement to convert the same into community property, does not destroy the trust, and even where the identity of the separate property is lost, the trust may be enforced by personal judgment, provided, of course, that the allegations authorize a personal judgment: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

Commingling and loss of identity of separate property does not destroy trust by converting separate property into community property: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

**(8) Effect of taking title in joint names.** The mere fact that both a husband and his wife were named as the grantees in a deed would not operate, under section 164 of the Civil Code, to require a conclusion that the property purchased was community property: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

Where a conveyance is made to a married woman and to her husband, the presumption created by section 164 of the Civil Code, that the wife takes the part conveyed to her, as a tenant in common, is simply a *prima facie* presumption, except where a purchaser or encumbrancer in good faith and for a valuable consideration is concerned: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

A proviso in a deed, reserving to the grantors, who were husband and wife, "the right to the use, control, and proceeds of the property during their lives or the life of either



of them," did not authorize the husband, during the lifetime of his wife, and without her consent, to execute any writing which would create a lien or easement as against her interest: *Knoch v. Haizlip*, 163 Cal. 146, 124 Pac. 998.

**(9) Change of character of.** Husband and wife may by contract change the character of their property from community to separate, and a court has the power to do so in an action between them, where such disposition is essential to a proper determination of their relative rights: *Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040.

The mere acquirement of the possession of a wife's separate property by the husband, and his subsequent management and control of the same, all with her consent, do not show any intent on the part of the wife to make a gift of the property to the husband or to change its status from separate to community property. The presumption in such a case is that the property continues to be the separate property of the wife and that the husband holds it in trust for her, and it devolves on the trustee claiming a gift or change in the status of the property to show the same: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

Assuming that such a presumption exists in favor of the husband, evidence that the purchase was made by the husband wholly with money in his possession constituting the separate property of the wife is sufficient to controvert it, and to sustain a finding that he acquired no beneficial interest in the property so purchased: *Shaw v. Bernal*, 163 Cal. 262, 124 Pac. 1012.

Any presumption as to the character of the property arising from the fact of a married woman engaging in business is held to be overcome by the fact that the business was purchased with the funds and the rents, issues, and profits derived from moneys owned by the wife before marriage or acquired afterward by gift or bequest: *Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 180, 125 Pac. 263.

In action for divorce, evidence that husband had performed labor in erecting house on land of wife, and gave her



money to pay off mortgage thereon, held not to make it community property: *Carlson v. Carlson*, 10 Cal. App. 300, 101 Pac. 923.

In action for divorce, finding that property is community property was not of fact but conclusion of law reviewable on appeal: *Carlson v. Carlson*, 10 Cal. App. 300, 101 Pac. 923.

**(10) Estoppel.** The allegation of a married woman, in her complaint for a divorce, that certain personalty is community property, does not estop her from asserting that it is separate property in a subsequent action by her to recover it from one who purchased it from her husband after the commencement of the divorce, the purchaser not having knowledge of the pendency of the divorce proceedings: *Coolidge v. Austin*, 22 Cal. App. 334, 134 Pac. 357.

In such case it is for the trial court to determine which of her conflicting statements is true: *Coolidge v. Austin*, 22 Cal. App. 334, 134 Pac. 357.

Proof that the wife left the property in the possession of the husband upon separating from him, unaccompanied by other indicia of ownership, does not establish an estoppel against her in favor of the purchaser: *Coolidge v. Austin*, 22 Cal. App. 334, 134 Pac. 357.

**(11) Trust in, by husband.** An express or resulting trust of the separate property by the husband, when established by the wife, is not prevented from enforcement by the doctrine of laches, when the husband is not prejudiced by the delay in enforcing the trust, and when an express trust exists, the statute of limitations does not begin to run until the trustee repudiates the trust: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

Where wife commits money of her separate estate to custody and control of husband upon his agreement that he will keep it or invest it for her, trust established is express trust: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.



Payment of part of price of land by husband with wife's money held in trust by him is same, in legal effect, as between parties, as payment by her, and created resulting trust in her favor for interest which equaled her proportion of price: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

Relation of parties and conduct with respect to wife's money justified finding of trust: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

The possession and control of a wife's separate property by a husband with her consent raises a presumption that he holds it in trust for her: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

Civil Code, Secs. 2221, 2222, do not change rule: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

The husband has the burden of showing a loan or gift of the wife's separate property to him, which, however, may be done either by proof of an express agreement or by circumstantial evidence: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

Mere acquirement of possession of wife's separate property by husband and his subsequent management and control of same with her consent do not show intent to make gift to husband: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

Gift may be shown by husband by showing nature of transaction and circumstances, as well as by express agreement: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.

Evidence held insufficient to show gift of wife's separate property to husband: *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360.







**PART XVIII.**  
**ESTATES OF MISSING PERSONS.**

**CHAPTER I.**  
**ESTATES OF MISSING PERSONS.**  
**INVALIDITY OF STATUTE. (See page 1743.)**

**PART XIX.**  
**COLLATERAL-INHERITANCE TAXES.**

**CHAPTER I.**  
**COLLATERAL-INHERITANCE TAXES.**

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#### COLLATERAL-INHERITANCE TAXES.

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**§ 1043a. Definitions.** (a) This act shall be known as the "Inheritance tax act."<sup>1</sup>

(b) The words "estate" and "property" as used in this act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor, or donor passing or transferred to individual legatees, devisees, heir next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the state.

(c) The word "transfer" as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein described.

(d) The word "decedent" as used in this act shall include the testator, intestate, grantor, bargainor, vendor, or donor.

(e) The words "county treasurer" and "district attorney" and "inheritance tax appraiser," as used in this act, shall be taken to mean the treasurer or the district attorney or the inheritance tax appraiser of the county of the superior court having jurisdiction, as provided in Sec. 15 of this act.

(f) The words "contemplation of death," as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift causa mortis; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of property transferred by testator or intestate laws.

**§ 1043b. Property taxable.** A tax shall be and is hereby imposed upon the transfer of any property, real, personal

<sup>1</sup> Cal. Statutes 1913, p. 1066; Deering's Henning's General Law, p. 1972.



or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, in the following cases:

**Resident decedents.** (1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state, or by any probate homestead set apart from said property.

**Nonresident decedents.** (2) When the transfer is by will or intestate laws of property within this state and the decedent was a nonresident of the state at the time of his death.

**Contemplation of death. Transfer to take effect after death.** (3) When the transfer is of property made by a resident, or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor, or intended to take effect in possession or enjoyment at or after such death. When such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of this act.

**§ 1043c. Power of appointment.** (a) Whenever any person or corporation shall be given a power of appointment by virtue of any disposition of property made before or after the passage of this act, such gift of power of appointment shall, under the provisions of this act, be deemed a transfer made from the donor of said power to the donee thereof and taxable upon said donor's death.

**Excessive commissions to executors.** (b) Whenever a decedent appoints or names one or more executors or trustees, and makes a bequest or devise of property to them in lieu



of commissions or allowances, which otherwise would be liable to said tax, or appoints them his residuary legatees, and said bequest, devise, or residuary legacies exceeds what would be a reasonable compensation for their services, such excess over and above the exemptions herein provided for shall be liable to said tax; and the superior court in which the probate proceedings are pending shall fix the compensation.

**Estates determinable by reference to death taxable.** (c) Where any property shall, after the passage of this act, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this act in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.

**§ 1043d. Lien. Limitation.** Such taxes shall be and remain a lien upon the property passed or transferred until paid, and the person to whom the property passes or is transferred, and all administrators, executors and trustees of every estate so transferred or passed, shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine, or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law; provided, that unless sued for within five years after they are due and legally demandable, such taxes, or any taxes accruing under any act herein repealed, shall cease to be a lien as against any bona fide purchaser of real property; and provided, that no such lien shall cease within five years



from the date of the passage of this act. The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted; and provided, that in determining said market value no deduction shall be made for any family allowance made out of said estate.

**§ 1043e. Primary rates.** When the property or any beneficial interest there so passed or transferred exceeds in value the exemption hereinafter specified and shall not exceed in value twenty-five thousand dollars, the tax hereby imposed shall be:

**Husband, wife, children, parents.** (1) Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestor of the decedent or any child adopted as such in conformity with the laws of this state, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent (provided, however, such relationship began at or before the child's fifteenth birthday, and was continuous for said ten years thereafter), or any lineal issue of such adopted or mutually acknowledged child, at the rate of one per centum of clear value of such interest in such property.

**Brother, sister, their descendants, son-in-law, etc.** (2) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of a decedent, a wife or widow or son, or the husband of a daughter of the decedent, at the rate of two per centum of the clear value of such interests in such property.

**Uncle, aunt, their descendants.** (3) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the decedent, at the rate of three per centum of the clear value of such interest in such property.



**Granduncle, or aunt, their descendants.** (4) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother of the decedent, at the rate of four per centum of the clear value of such interest in such property.

**Other persons.** (5) Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of five per centum of the clear value of such interest in such property.

**§ 1043f. Secondary rates.** The foregoing rates in Sec. 5 are for convenience termed the primary rates. When the market value of such property or interest exceeds twenty-five thousand dollars, the rates of tax upon such excess shall be as follows:

(1) Upon all in excess of twenty-five thousand dollars and up to fifty thousand dollars, two times the primary rates.

(2) Upon all in excess of fifty thousand dollars and up to one hundred thousand dollars, three times the primary rates.

(3) Upon all in excess of one hundred thousand dollars and up to two hundred and fifty thousand dollars, four times the primary rates.

(4) Upon all in excess of two hundred and fifty thousand dollars and up to five hundred thousand dollars, five times the primary rates.

(5) Upon all in excess of five hundred thousand dollars and up to one million dollars, five times the primary rate and in addition thereto two and one-half per centum of the clear market value of such interest in such property.

(6) Upon all in excess of one million dollars, five times the primary rate and in addition thereto five per centum of the clear market value of such interest in such property.



§ 1043g. **Exemptions.** The following exemptions from the tax are hereby allowed:

**Charities.** (1) All property transferred to societies, corporations, and institutions now or hereafter exempted by law from taxation, or to any public corporation, or to any society, corporation, institution, or association of persons engaged in or devoted to any charitable, benevolent, educational, public, or other like work (pecuniary profit not being its object or purpose) or to any person, society, corporation, institution, or association of persons in trust for or to be devoted to any charitable, benevolent, educational, or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be exempt.

**Persons named in subdivision 1, section 5.** (2) Property of the clear value of twenty-four thousand (\$24,000) dollars transferred to the widow or to a minor child of the decedent, and of ten thousand (\$10,000) dollars transferred to each of the other persons described in the first subdivision of Sec. 5, shall be exempt.

**Subdivision 2, section 5.** (3) Property of the clear value of two thousand (\$2000) dollars transferred to each of the persons described in the second subdivision of Sec. 5, shall be exempt.

**Subdivision 3, section 5.** (4) Property of the clear value of one thousand five hundred (\$1500) dollars transferred to each of the persons described in the third subdivision of Sec. 5, shall be exempt.

**Subdivision 4, section 5.** (5) Property of the clear value of one thousand (\$1000) dollars transferred to each of the persons described in the fourth subdivision of Sec. 5, shall be exempt.

**Subdivision 5, section 5.** (6) Property of the clear value of five hundred (\$500) dollars transferred to each of the



persons and corporations described in the fifth subdivision of Sec. 5, shall be exempt.

**§ 1043h. Tax due at death. Rebate.** (a) All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum per annum shall be charged and collected from the time said tax accrued; provided, that if said tax is paid within six months from the accruing thereof a discount of five per centum shall be allowed and deducted from said tax. And in all cases where the executors, administrators, or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in subdivision (a) of Sec. 9 of this act for the payment of said tax, together with interest.

**Penalty for nonpayment.** (b) The penalty of ten per cent per annum imposed by subdivision (a) of this section, for the nonpayment of said tax, shall not be charged in cases where, in the judgment of the court, by reason of claims made upon the estate necessary litigation, or other unavoidable cause of delay, the estate of any decedent, or a part thereof, can not be settled at the end of eighteen months from the death of the decedent; but in such cases seven per cent per annum shall be charged upon the said tax from the expiration of said eighteen months until the cause of such delay is removed, after which ten per cent interest per annum shall again be charged until the tax is paid; but litigation to defeat the payment of the tax shall not be considered necessary litigation.

**§ 1043i. Tax on limited estate due at death.** (a) When any grant, gift, legacy, devise or succession upon which a tax is imposed by Sec. 2 of this act shall be an estate, income, or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal,



the entire property or fund by which such estate, income, or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, and the market value thereof determined, in the manner provided in Secs. 16 or 17 of this act, and the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and, together with the interest thereon, shall be and remain a lien on said property until the same is paid; provided, that the person or persons, or body politic or corporate, beneficially interested in the property chargeable with said tax, may elect not to pay the same until they shall come into the actual possession or enjoyment of such property, and in that case such person or persons, or body politic or corporate, shall execute a bond to the people of the state of California, in a penalty of twice the amount of tax arising upon personal estate, with such sureties as the said superior court may approve, conditioned for the payment of said tax and interest thereon at such time or period as they or their representatives may come into actual possession or enjoyment of such property, and conditioned further, that if said bond be not renewed, as herein provided, the amount of said tax and interest thereon shall immediately become due and payable. Said bond shall be filed in the office of the county clerk of the proper county and a certified copy thereof shall be immediately transmitted to the state controller; provided, further, that such person shall make a full and verified return of such property to said court, and file the same in the office of the county clerk within one year from the death of the decedent, and within that period enter into such security, and renew the same every five years. If the same shall not be so renewed before the expiration of each five-year period, the bond shall immediately become due and payable, and if the same be not paid forthwith the attorney-general shall file an action in the name of the people of the state, on the relation of the controller, to recover the same.

**No allowance on account of contingent encumbrance. (b)**  
In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there



are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent encumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated, or diminished; provided, however, that in the event of such encumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat, or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the encumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section 12 hereof upon order of the court having jurisdiction.

**Conditional estates taxable at highest rate.** (c) When property is transferred in trust or otherwise, and the rights, interest, or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this act, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this act. Such return of overpayment shall be made in the manner provided by section 12 of this act, upon order of the court having jurisdiction.



**Estates in expectancy.** (d) Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

**Defeasible estates.** (e) Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

**Determination of value of limited estates.** (f) The value of every future, or contingent or limited estate, income, or interest, shall, for the purposes of this act be determined by the rule, methods, and standards of mortality and of value that are set forth in the actuaries' combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interest and contingencies shall be five (5) per cent per annum. The insurance commissioner shall without a fee on the application of any superior court or of any inheritance tax appraiser determine the value of any future or contingent estate, income, or interest therein limited, contingent, dependent, or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's application or other facts to him submitted by said appraiser or said court and certify the same in duplicate to such court or appraiser, and his certificate thereof shall be conclusive evidence that the method of computation therein is correct.

**§ 1043j. Executor to deduct tax from legacy.** (a) Any administrator, executor, or trustee having in charge or trust



any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid; if, however, such legacy be given in money to any person for a limited period, the executor, administrator, or trustee shall retain the tax upon the whole amount; but if it be not in money he shall make application to the superior court to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

**Sale of property to pay tax.** (b) All executors, administrators, and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled by law to do for the payment of debts of the estate, and the amount of said tax shall be paid as hereinafter directed.

**Tax payable to county treasurer.** (c) Every sum of money retained by an executor, administrator, or trustee, or paid into his hands, for any tax on property, shall be paid by him, within thirty days thereafter, to the treasurer of the county in which the probate proceedings are pending.

**§ 1043k. Receipt.** Upon the payment to any county treasurer of any tax due under this act, such treasurer shall issue a receipt therefor, in triplicate, one copy of which he shall deliver to the person paying said tax, and the original and one copy thereof he shall immediately send to the controller of state, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and said controller shall retain one of said receipts, and the other he



shall countersign and seal with the seal of his office, and immediately transmit to the clerk of the court fixing such tax. And an executor, administrator, or trustee shall not be entitled to credits in his accounts, nor be discharged from liability for such tax, nor shall said estate be distributed, unless a receipt so sealed and countersigned by the controller, or a copy thereof, certified by him, shall have been filed with the court. Any person shall, upon payment to the county treasurer of the sum of 50 cents, be entitled to a duplicate, or copy, of any receipt that may have been given by said treasurer for the payment of any tax under this act.

**§ 10431. Refund.** If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the superior court having jurisdiction, on notice to the state controller, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator, or trustee, if the tax has not been paid to the county treasurer; or if such tax has been paid to such county treasurer, such officer shall refund out of any inheritance tax moneys in his hands or custody such equitable proportion of the tax, and credit himself with the same in the account required to be rendered by him under this act. If, after the payment of any tax in pursuance of an order fixing such tax, made by the superior court having jurisdiction, such order be modified or reversed by the superior court having jurisdiction within two years from and after the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the state controller, the county treasurer shall refund to the executor, administrator, trustee, person, or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of tax fixed by the order modified or reversed, out of any inheritance tax moneys, in his hands or custody, and credit himself with the same in the



account required to be rendered by him to the controller on his semi-annual settlement; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination of such appeal or of an appeal taken therefrom, and the representatives of the estate, legatees, devisees, or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state controller shall deduct from the fees allowed by this act to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the superior court that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such superior court to enter an order assessing the tax upon the amount wrongfully or erroneously deducted. This section, as amended, shall apply to appeals and proceedings now pending and taxes heretofore paid in relation to which the period of one year from such reversal or modification has not expired when this section, as amended, takes effect.

**§ 1043m. Notice of transfer of property of decedent to be given by banks, executors, etc. Consent of controller. Examination. Penalty.** If a foreign executor, administrator, or trustee shall assign or transfer any stock or obligation in this state standing in the name of a decedent, or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county on the transfer thereof. No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or under control securities, deposits, or other assets, belonging to or standing in the name of a decedent who was a resident or nonresident or belonging to, or standing in the joint names of such a decedent and one or more persons, including the shares of the capital stock of, or other interest in, the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer herein provided, shall deliver or transfer the



same to the executors, administrators, or legal representatives of said decedent, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, or upon their order or request, without retaining a sufficient portion or amount thereof to pay any tax and interest which may thereafter be assessed thereon under this act and unless notice of the time and place of such delivery or transfer be served upon the state controller and county treasurer at least ten days prior to said delivery or transfer; provided, that the state controller, or person by him in writing authorized so to do, may consent in writing to said delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank, or other institution, person, or persons from the obligation hereunder to give such notice or to retain any portion of said securities, deposits, or other assets in their possession or control. And it shall be lawful for the state controller or county treasurer, personally or by representatives, to examine said securities, deposits, or assets at the time of said delivery or otherwise. Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank, or other institution, person or persons, liable to a penalty of not less than one thousand (\$1000) dollars, nor more than twenty thousand (\$20,000) dollars, and in addition thereto said safe deposit company, trust company, corporation, bank, or other institution, person or persons shall be liable for the amount of the taxes, interest, and penalties due under this act on said securities, deposits, or other assets above mentioned, and said penalties and liabilities of said safe deposit company, corporation, bank, or other institution, person or persons for the violation of this section may be enforced in an action brought by the state controller or county treasurer in any court of competent jurisdiction.

**§ 1043n. Appraisers. Compensation.** The state controller shall appoint, and may at his pleasure remove, one or more persons in each county of the state to act as inheritance tax appraisers therein. Every such inheritance tax appraiser (in addition to any fees paid him as appraiser under section 1444 of the Code of Civil Procedure) shall be paid by the



county treasurer out of any funds that he may have in his hands on account of said tax, on presentation of a sworn itemized account and on the certificate of the superior court, at the rate of \$5 per day for every day actually and necessarily employed in said inheritance tax appraisement, together with his actual and necessary traveling and other incidental expenses, and the fees paid such witnesses as he shall subpoena before him which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record; provided, that in any probate proceeding in which the executor or administrator shall have failed to have had the inheritance tax appraiser act as one of the appraisers under section 1444 of the Code of Civil Procedure and to have paid him his fees therefor, the expense of making the inheritance tax appraisement in this act provided for shall be paid out of said estate, and the executor or administrator thereof shall be liable for said fee. Any such appraiser who shall take any fee or reward, other than such as may be allowed him by law, from any executor, administrator, trustee, legatee, next of kin, or heir of any decedent, or from any other person liable to pay said tax, or any portion thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$250 nor more than \$500, or be imprisoned in the county jail ninety days, or both, and in addition thereto the court shall dismiss him from such service.

**§ 1043o. Jurisdiction of the superior court.** The superior court in the county in which is situate the real property of a decedent, who was not a resident of the state, or if there be no real property, then in the county in which any of the personal property of such nonresident is situate, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act; the court first acquiring jurisdiction hereunder shall retain the same, to the exclusion of every other; provided, that the superior court having acquired jurisdiction in probate of the estate of a decedent shall hear and determine in said probate proceedings all questions in relation



vided, that a copy of such notice and of such objections shall be forthwith mailed to the state controller, county treasurer, and inheritance tax appraiser. Upon the hearing of said objections, said court may make such order as to it may seem meet and proper in the premises.

**Certificate of no tax due.** (c) Provided that, if, upon examination of the executor or administrator of said estate or other persons familiar with the affairs of such decedent, or from other information before him, it shall appear to the inheritance tax appraiser that there is no inheritance tax due out of said estate or a lien upon any property or interest therein, said appraiser may so certify to the superior court, and at any time thereafter, said superior court may order or decree that there are no inheritance taxes due out of said estate or upon any interest therein or may make such different order as may to it seem meet in the premises.

**§ 1043q. Citation to parties in cases of transfer without probate. Appearance before appraiser. Procedure. Appearance before court.** If it shall appear to the superior court upon petition of the state controller or the county treasurer or any other interested person that any transfer has been made within the meaning of this act, and the taxability thereof, and the liability for such tax and the amount thereof have not been determined, and that no proceedings are pending in any court in this state wherein the taxability of such transfer and the liability therefor and the amount hereof may be determined, said court shall issue a citation ordering and directing the persons who may appear liable therefor or known to own any interest in or part of the property transferred, to appear before said court or before an inheritance tax appraiser to be designated by said order at a time and place in said order named, not less than ten days nor more than ninety days from the date of such order, to be examined under oath by said court or by said appraiser as the case may be, concerning said transfer and all facts connected therewith, and concerning the property transferred and the character and value thereof.



If said person or persons shall be directed to appear before said appraiser, said appraiser shall, at the time and place in said order named, or at such time and place to which said appraiser may adjourn said hearing, proceed to examine said person or persons and such witnesses as said appraiser may subpoena before him, and for the purpose of said hearing, and for the purpose of ascertaining any facts concerning the taxability of said transfer or any taxes due on account of such transfer, said appraiser shall have the powers of a referee of said court, and is hereby authorized to issue subpoenas compelling the attendance of witnesses before him, and to administer oath, and to take the evidence of such witnesses under oath concerning such property and the value thereof and concerning such transfer. Said appraiser shall report to said court his findings and conclusions in relation to said transfer and said tax, and may return to said court, any depositions, exhibits, or other testimony or information taken before him or exhibited to him. The procedure subsequent to the filing of said report shall conform to subdivision (b) of section 16 of this act.

Except as herein otherwise provided, the service of such citation and the time, manner, and proof thereof, and the hearing and determination thereon, and the hearing and determination upon the facts returned in such report, and the enforcement of the determination or decree, shall conform to the provisions of chapter 12 of title 11 of part 3 of the Code of Civil Procedure, and the clerk of the court shall, upon the request of the state controller or the treasurer of the county, furnish, without fee, one or more transcripts of such decree, and the same shall be docketed and filed by the county clerk of any county in the state, without fee, in the same manner and with the same effect as provided by section 674 of said Code of Civil Procedure for filing a transcript of an original docket.

The superior court may hear the said cause upon the relation of the parties and the testimony of witnesses, and evidence produced in open court, and, if the court shall find said property is not subject to any tax, as herein provided,

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vided, that a copy of such notice and of such objections shall be forthwith mailed to the state controller, county treasurer, and inheritance tax appraiser. Upon the hearing of said objections, said court may make such order as to it may seem meet and proper in the premises.

**Certificate of no tax due.** (c) Provided that, if, upon examination of the executor or administrator of said estate or other persons familiar with the affairs of such decedent, or from other information before him, it shall appear to the inheritance tax appraiser that there is no inheritance tax due out of said estate or a lien upon any property or interest therein, said appraiser may so certify to the superior court, and at any time thereafter, said superior court may order or decree that there are no inheritance taxes due out of said estate or upon any interest therein or may make such different order as may to it seem meet in the premises.

**§ 1043q. Citation to parties in cases of transfer without probate. Appearance before appraiser. Procedure. Appearance before court.** If it shall appear to the superior court upon petition of the state controller or the county treasurer or any other interested person that any transfer has been made within the meaning of this act, and the taxability thereof, and the liability for such tax and the amount thereof have not been determined, and that no proceedings are pending in any court in this state wherein the taxability of such transfer and the liability therefor and the amount hereof may be determined, said court shall issue a citation ordering and directing the persons who may appear liable therefor or known to own any interest in or part of the property transferred, to appear before said court or before an inheritance tax appraiser to be designated by said order at a time and place in said order named, not less than ten days nor more than ninety days from the date of such order, to be examined under oath by said court or by said appraiser as the case may be, concerning said transfer and all facts connected therewith, and concerning the property transferred and the character and value thereof.



If said person or persons shall be directed to appear before said appraiser, said appraiser shall, at the time and place in said order named, or at such time and place to which said appraiser may adjourn said hearing, proceed to examine said person or persons and such witnesses as said appraiser may subpoena before him, and for the purpose of said hearing, and for the purpose of ascertaining any facts concerning the taxability of said transfer or any taxes due on account of such transfer, said appraiser shall have the powers of a referee of said court, and is hereby authorized to issue subpoenas compelling the attendance of witnesses before him, and to administer oath, and to take the evidence of such witnesses under oath concerning such property and the value thereof and concerning such transfer. Said appraiser shall report to said court his findings and conclusions in relation to said transfer and said tax, and may return to said court, any depositions, exhibits, or other testimony or information taken before him or exhibited to him. The procedure subsequent to the filing of said report shall conform to subdivision (b) of section 16 of this act.

Except as herein otherwise provided, the service of such citation and the time, manner, and proof thereof, and the hearing and determination thereon, and the hearing and determination upon the facts returned in such report, and the enforcement of the determination or decree, shall conform to the provisions of chapter 12 of title 11 of part 3 of the Code of Civil Procedure, and the clerk of the court shall, upon the request of the state controller or the treasurer of the county, furnish, without fee, one or more transcripts of such decree, and the same shall be docketed and filed by the county clerk of any county in the state, without fee, in the same manner and with the same effect as provided by section 674 of said Code of Civil Procedure for filing a transcript of an original docket.

The superior court may hear the said cause upon the relation of the parties and the testimony of witnesses, and evidence produced in open court, and, if the court shall find said property is not subject to any tax, as herein provided,

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the court shall, by order, so determine; but if it shall appear that said property, or part thereof, is subject to any such tax, the same shall be appraised and taxed as in other cases.

**§ 1043r. Action to collect tax.** If, after the expiration of eighteen months from the accrual of any tax under this article, such tax shall remain due and unpaid, after the refusal or neglect of the persons liable therefor to pay the same, the county treasurer shall notify, or the state controller may notify, the district attorney of the county in writing of such failure or neglect, and such district attorney shall bring and prosecute an action or actions in the name of the state as plaintiff, for the recovery of such tax and for the purpose of enforcing any lien or liens against all or any of the property subject thereto. In any such action the owner of any property or of any interest in property against which the lien of any such tax is sought to be enforced, and any predecessor in interest of any such owner whose title or interest was deraigned through any such decedent by will or succession or by decree of distribution of the estate of such decedent, and any lienor or encumbrancer subsequent to the lien of such tax may be made a party defendant. The enumeration in this section of the persons who may be made defendants shall not be deemed to be exclusive, but the joinder or nonjoinder of parties, except when otherwise herein provided, shall be governed by the rules in equity in similar cases.

**Quieting title.** (a) Actions may be brought against the state for the purpose of quieting the title to any property, against the lien or claim of lien of any tax or taxes under this act, or for the purpose of having it determined that any property is not subject to any lien for taxes under this act. In any such action, the plaintiffs may be any administrator or executor of the estate or will of any decedent, whether the said estate shall have been fully administered and the estate settled and closed or not, and any heir, legatee, or devisee of any such decedent, or trustee of the estate or of any part of the estate of such decedent, or distributee of the estate or of any part of the estate of any such



decedent, and any assignee, grantee, or successor in interest of any such persons, and all or any other persons who might be made parties defendant in any action brought by the state under the provisions of this section, and notwithstanding that all or any of the persons enumerated in this section shall or may have assigned, granted, conveyed, or otherwise parted with all or any interest in or title to the property, or any thereof, involved in any such claim of lien before the commencement of such action. All or any of the persons in this action enumerated may be joined or united as parties plaintiff. The enumeration in this section of the persons who may be made parties shall not be deemed to be exclusive, but the joinder or nonjoinder of parties, except when otherwise herein provided, shall be governed by the rules in equity in similar cases. In all cases any person who might properly be a party plaintiff in any such action who refuses to join as plaintiff may be made a defendant.

**Jurisdiction.** (b) All actions under this section shall be commenced in the superior court of the county in which is situated any part of any real property against which any lien is sought to be enforced, or to which title is sought to be quieted against any lien, or claim of lien; but if in said action no lien against real property is sought to be enforced, the action shall be brought in the superior court of the county which has or which had jurisdiction of the administration of the estate of the decedent mentioned herein.

**Service of summons.** (c) Service of summons in the actions brought against the state shall be made on the controller of state and on the district attorney of the county in which the estate of the decedent mentioned herein is being administered, or has been administered in probate proceedings, and it shall be the duty of said district attorney to defend all such actions.

**Procedure.** (d) The procedure and practice in all actions brought under this section, except as otherwise provided in this act, shall be governed by the provisions of the Code of



Civil Procedure in relation to civil actions, so far as the same shall or may be applicable, including all provisions relating to motions for new trials and appeals.

**Remedies additional.** (e) The remedies provided in this section shall be in addition to and not exclusive of any remedies provided in the sections preceding this section.

**§ 1043s. Duties of district attorney.** Whenever the treasurer of any county or an inheritance tax appraiser therein, or the controller shall have reason to believe that any transfer has been made within the meaning of this act and that a tax due thereon remains undetermined and unpaid, he may notify the district attorney in writing of such transfer, and the district attorney, if he have probable cause to believe a tax is due, and remains undetermined, shall prosecute the necessary proceeding in the superior court to determine and fix such tax and for the enforcement and collection thereof. Said district attorney shall be allowed his actual and necessary expenses incurred in such proceeding out of any inheritance tax moneys in the hands of the county treasurer or order of the superior court.

**§ 1043t. Duties of county treasurer.** The treasurer of each county shall collect and pay the state treasurer all taxes that may be due and payable under this act, who shall give him a receipt therefor; of which collection and payment he shall make a report, under oath, to the controller, between the first and fifteenth days of May and December of each year, stating for what estate paid, and in such form and containing such particulars as the controller may prescribe; and for all such taxes collected by him and not paid to the state treasurer by the first day of June and January of each year he shall pay interest at the rate of 10 per centum per annum.

**§ 1043u. Fees of county treasurer.** The treasurer of each county shall be allowed to retain, on all taxes paid and accounted for by him each year under this act, in addition to his salary or fees now allowed by law, 3 per centum of the first \$50,000 so paid and accounted for by him, 1½ per



centum on the next \$50,000 so paid and accounted for by him, and  $\frac{1}{2}$  of 1 per centum on all additional sums so paid and accounted for by him; provided, that no county treasurer shall be entitled to retain to his own use more than the sum of \$200 out of the inheritance taxes paid on account of any transfer or transfers made by, or resulting from the death of any one decedent, nor more than \$3000 out of the total inheritance taxes accounted for in any one year.

**§ 1043v. Employment by controller of special attorneys, etc.** The state controller, whenever he shall be cited as a party in any proceeding or action to determine any tax under this act provided, or whenever he shall deem it necessary for the better enforcement of this act to make any special employment to secure evidence of evasion of said tax, or to commence or appear in any proceeding or action to determine any tax hereunder, may, by and with consent and approval of the attorney general, make such special employment or designate and employ counsel or attorney in or out of this state to represent him on behalf of the state, and, by and with such consent of the attorney general, he is hereby authorized to incur the necessary expense for such employment and any reasonable and necessary expense incident thereto. And the county treasurer is hereby authorized and directed to pay out of any funds which may be in his hands on account of this tax, on presentation of a sworn itemized account and on certificate of the state controller and attorney general, all expenses incurred as in this section above provided, but no expense for such special employment or legal services, up to and including the entry of the order of the court fixing the tax and the same becoming final, shall exceed 10 per centum of the tax and penalties collected; provided, that all reasonable and necessary expenses incurred, in any legal action or proceeding in any court of this state or on any appeal therefrom, other than attorney's fees, including expense of serving processes and printing and preparing of necessary legal papers, may be allowed and paid in the manner above provided, even though no tax be recovered in such action or proceeding, and the limitations herein made shall not apply thereto.



**§ 1043w. Dispositon of taxes collected.** All taxes levied and collected under this act, up to the amount of \$250,000 annually, shall be paid into the treasury of the state, for the uses of the state school fund, and all taxes levied and collected in excess of \$250,000 annually shall be paid into the state treasury to the credit of the general fund thereof.

**§ 1043x. Delinquency of officials.** Every officer who fails or refuses to perform, within a reasonable time, any and every duty required by the provisions of this act, or who fails or refuses to make and deliver within a reasonable time any statement or record required by this act, shall forfeit to the state of California the sum of \$1000, to be recovered in an action brought by the attorney general in the name of the people of the state on the relation of the controller.

**§ 1043y. Constitutionality of act.** If any section, subsection, sentence, clause, or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses, or phrases be declared unconstitutional.

**§ 1043z. Repealed. Saving clauses.** An act entitled "An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions, and transfers; to provide for its collection, and to direct the disposition of its proceeds; to provide for the enforcement of liens created by this act and for suits to quiet title against claims of lien arising hereunder; to repeal an act entitled 'An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions, and transfers; to provide for its collection, and to direct the disposition of its proceeds; to provide for the enforcement of liens created by this act and for suits to quiet title against claims of liens arising hereunder; to repeal an act entitled "An act to establish a tax on collateral inheritances, bequests, and devises; to provide for the collection, and to



direct the disposition of its proceeds," approved March 23, 1893, and all amendments thereto, and to repeal all acts and parts of acts in conflict with this act,' approved March 20, 1905, and all amendments thereto and all acts and parts of acts in conflict with this act," approved April 7, 1911, and all amendments thereto, and all acts and parts of acts in conflict with this act are hereby expressly repealed; provided, however, that such repeal shall in nowise affect any suit, prosecution, or court proceeding pending at the time this act shall take effect, or any right which the state of California may have at the time of the taking effect of this act, to claim a tax upon any property under the provisions of the act or acts hereby repealed, for which no proceeding has been commenced; nor affect any appeal, right of appeal in any suit pending, or orders fixing tax, existing in this state at the time of the taking effect of this act.

1. RIGHT TO IMPOSE. (See page 1762.)

2. CONSTITUTIONALITY OF ACTS.

(1) **In general.** The inheritance tax law of the Territory of Hawaii (Act 102, S. L. 1905), is not unconstitutional by reason of discrimination or lack of uniform protection: *Brown v. Treasurer*, 20 Haw. 41.

A tax on inheritance is a tax on the transitus of the property and not upon the property itself, and the act of May 26, 1908 (Laws 1908, Ch. 81, Art. II of the state of Oklahoma), is not unconstitutional: *McGannon v. State*, 33 Okla. 145, 124 Pac. 1063.

The material parts of the statutes of the several states relative to inheritance tax are the same, in effect, as those of Colorado, and although the New York and New Jersey statutes designate the tax as a "transfer tax" they also say that "transfer," as used, shall be taken to include the passing of property by descent, devise, bequest, etc., thus making those statutes the same as those of Colorado: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555. (See page 1763.)



**(2) Due process of law.** (See page 1763.)

**(3) Uniformity of taxation.** Upon appeal from an order of the superior court directing a widow, as sole devisee of her deceased husband, to pay the "inheritance tax" under the act approved March 20, 1905, the contention that such tax makes an unjust discrimination between citizens of this state and citizens of other states, in violation of the fourteenth amendment to the federal constitution, is not involved, when it can not be determined that the appellant is an aggrieved party. It is only when a nonresident of the state assails the validity of the law on that ground that this question will be decided. The validity of the inheritance tax in question has been repeatedly upheld by the supreme court of this state: *Estate of Damon*, 10 Cal. App. 542, 102 Pac. 684.

The inheritance tax (Ch. 248 of the laws of 1909) does not violate that clause in the bill of rights declaring that free governments are instituted for equal protection and benefit and is not in conflict with the constitutional provisions respecting uniformity in the operation of general laws and uniformity and equality in the rates of assessment and taxation, and is therefore held valid: *State v. Cline*, 91 Kan. 416, 137 Pac. 936. (See page 1763.)

**(4) Exemptions.** A probate homestead is not property passing by will and is exempt from the tax: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280. (See page 1764.)

**REFERENCES.**

Applicability of general tax exemptions to inheritance or succession taxes, see note 48 L. R. A. (N. S.) 373.

As to whether property out of state must be included in fixing exemptions under inheritance tax, see note 39 L. R. A. (N. S.) 1024.

**(5) Same. Discrimination.** (See page 1764.)

**(6) Conformity of body of act with its title.** (See page 1765.)



(7) **Revision of act or amendment of section.** (See page 1766.)

(8) **Alien heirs.** An inheritance tax law which imposes upon alien heirs of a deceased citizen of the United States a greater tax than that imposed upon such heirs if not aliens, when in violation of rights under a treaty between the United States and the country of such alien heirs, must be held in abeyance and yield to the provisions of the treaty: *In re Stixrud's Estate*, 58 Wash. 339, 109 Pac. 349.

#### REFERENCES.

Validity of discrimination against aliens by inheritance tax law as affected by treaty with foreign government, see note 33 L. R. A. (N. S.) 632.

Debt due to nonresident secured by mortgage upon land within the state is subject of inheritance tax, see note 35 L. R. A. (N. S.) 784.

### 3. CONSTRUCTION OF ACTS.

(1) **In general. Similarity.** In determining the question what property is subject to the inheritance tax imposed by the act of March 20, 1905 (Stats. 1905, p. 341), as distinguished from the statutory exemption created thereby, the all important section thereof to be considered is section 1, which imposes the tax and limits it to "property which shall pass by will or by intestate laws of this state," from a deceased resident of this state "to any person or persons," etc., property not "so passing" is not "subject to taxation" and no question of "exemption" is involved in determining that question: *Estate of Kennedy*, 157 Cal. 517, 108 Pac. 280.

Where a statute is open to either construction, one prescribing the exaction of an inheritance tax upon the same property in two jurisdictions should be favored over one having the contrary effect: *State ex rel. v. Davis*, 88 Kan. 849, 129 Pac. 1197.

It is only property that has passed by will or descent that is charged with the inheritance tax, and it is upon those who



succeed to the beneficial interests that the burden is cast: *In re Macky's Estate*, 46 Colo. 79, 102 Pac. 1078.

The scope of the inheritance tax is limited to collateral inheritances: *Wirringer v. Morgan*, 12 Cal. App. 26, 106 Pac. 425.

Illegitimate children acknowledged by their father in accordance with Civil Code, Sec. 1387, are not "collateral heirs": *Wirringer v. Morgan*, 12 Cal. App. 26, 106 Pac. 425.

An inheritance tax is a tax which the person who inherits is liable to pay and is not a debt or charge against the decedent or the estate: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555. (See page 1766.)

#### REFERENCES.

Inheritance tax a dower, curtesy, statutory homestead, or allowances, see note 29 L. R. A. (N. S.) 428, 34 L. R. A. (N. S.) 1161.

Succession tax upon provision in lieu of dower, see note 33 L. R. A. (N. S.) 230, 45 L. R. A. (N. S.) 228.

Effect of fact that property otherwise exempt from taxation is devoted to purposes of a particular society, see note 26 L. R. A. (N. S.) 696.

Inheritance tax on gift in contemplation of death, see note 18 L. R. A. (N. S.) 458-461, 46 L. R. A. (N. S.) 790.

Applicability of inheritance tax to property conveyed in consideration of support of grantor during his life, 18 L. R. A. (N. S.) 226-227.

Liability of community property to inheritance tax, see note 20 L. R. A. (N. S.) 208, 39 L. R. A. (N. S.) 1107.

As to payment of inheritance tax on money or property of estate, which has been lost or misappropriated since decedent's death, see note 32 L. R. A. (N. S.) 1167.

Inheritance tax on conveyance to take effect after grantor's death, see note 38 L. R. A. (N. S.) 1139.

Inheritance tax, retrospective operation, see note 44 L. R. A. (N. S.) 419.

(2) **Inheritance and taxes. Distinction.** All courts and all governments conceive that the transmission of property occasioned by death, although differing from tax on property as such, is nevertheless a usual subject of taxation. It is the privilege of succeeding to or inheriting the property and not the property itself, which is taxed. In the consideration



of this subject the distinction between an inheritance tax as such and a property tax as such must at all times be kept in view. The inheritance tax law of South Dakota is not in conflict with section 17, article 6 of the constitution of that state: *In re McKinnon's Estate*, 27 S. Dak. 139; see also *Id.* 25 S. Dak. 369.

An inheritance tax is not a tax upon property but is a charge upon the right or privilege of receiving it: *In re Stixrud's Estate*, 58 Wash. 339, 109 Pac. 317.

An inheritance tax is not a tax upon property, but is a tax or excise upon the power or right of transmitting property or receiving property by will, or under intestate laws: *In re Macky's Estate*, 46 Colo. 79, 102 Pac. 1076.

The inheritance tax is a charge upon succession by inheritance or transfer by will: *McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027, 1028.

An inheritance tax is not a tax upon property but on the right to succeed to the property: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555.

An inheritance tax, not being a tax upon the property but upon the right to take it, can not be said to reduce the value of the property that passes: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555. (See page 1767.)

**(3) Right of state.** (See page 1767.)

**(4) Collateral inheritance tax. Liability for.** Under the collateral inheritance tax of 1893 as amended in 1899 illegitimate children made lawful heirs of a father by written acknowledgment duly executed as provided in section 1337 of the Civil Code, are not collateral heirs within the title of the act, nor subject to the tax thereby imposed, whether they are or are not included within its exceptions of "lawful issue" or "any child or children lawfully adopted as such in conformity with the laws of the state of California": *Wirringer v. Morgan*, 12 Cal. App. 26, 106 Pac. 425.



An inheritance tax is properly charged to the beneficiaries: *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105.

Where a husband buys and pays for property with his own money but takes the title in the name of his wife on an agreement that she is to will it to him, which she does not do, and he afterward acquires the title in his own name, he is not chargeable with an inheritance tax in respect of the property: *Nelson v. Schoonover*, 89 Kan. 779, 132 Pac. 1185.

The wife is not liable under section 1873, Rev. Codes of Idaho, upon the death of her husband to pay an inheritance tax on her one-half of the community property, for the reason that the property does not pass to her "by will or by the intestate laws of this state": *Kohnig v. Dunbar*, 21 Ida. 258, 121 Pac. 544.

An inheritance tax, while not a debt of a testator, is properly chargeable to the beneficiaries: *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1107.

The liability for the inheritance tax imposed by section 7724 of the Rev. Codes of Montana applies to all property passing by will or succession under the laws of that state, whether decedent were a resident or not, and does not depend upon distribution of the estate nor upon the amounts of the specific legacies or distributive shares: *State v. District Court*, 41 Mont. 357, 109 Pac. 440.

Bequests to a city and county for a hospital and to the regents of a state university for an auditorium being bequests to subdivisions of the state in the exercise of governmental duties are not subject to an inheritance tax under the general rule that the property of the state or of its governmental agencies is not subject to taxation: *In re Macky's Estate*, 46 Colo. 79, 102 Pac. 1082.

Property passing by virtue and force of law governing testate or intestate succession is liable to the tax: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280.

Property passing by will held not to include homestead passing by order of probate court: *In re Kennedy's Estate*, 157 Cal. 517, 108 Pac. 280.



The inheritance tax is imposed solely upon the devisee, legatee, or heir, and upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir: *Estate of Williams*, 17 Cal. App. 595, 137 Pac. 1067.

The entire property, that passes at all, passes immediately upon the death, and as the heir must pay the tax, and not the estate, the heir receives the entire property and may pay the tax out of his or her personal funds, but, for convenience and certainty of collection, it is provided that it must be paid by the executor or administrator: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555. (See page 1768.)

#### REFERENCES.

As to the nature of an inheritance tax, see note 33 L. R. A. (N. S.) 606.

As to inheritance taxation, see note in 127 Am. St. 1035.

(5) **Same. When payable with interest.** (See page 1769.)

(6) **Same. Computation of primary rates. Exemption.** In computing the amount of an inheritance tax imposed by the act of 1905 (Stats. 1905, p. 341), the amount of the exemption allowed to various classes of persons by section 4 thereof should not be deducted from the value of the distributive share as a whole, but should be deducted from the first \$25,000 of value thereof to which the primary rates fixed by section 2 thereof are applied. Thus where the value of the distributive share passing to a child is \$63,000 the exemption of \$4000 should be deducted from the first \$25,000 thereof and a tax imposed upon the balance of \$21,000, at the primary rate of 1 per cent, on the next \$25,000 at the rate of 1½ per cent, and on the balance of the distributive share at the rate of 2 per cent: *Estate of Tirnken*, 158 Cal. 51, 109 Pac. 608.

The exemption from inheritance tax under the Rev. Codes of Montana, Sec. 7724, of all estates which may be valued at a sum less than \$7500 applies to the value of the entire estate and not to any particular part or interest in it so that any such part or interest though of less value than \$7500 is sub-



ject to the tax where the value of the entire estate exceeds that sum: *State v. District Court*, 45 Mont. 335, 122 Pac. 924. (See page 1769.)

**(7) Nonresidents.** Under the inheritance tax statute of the Territory of Hawaii shares of stock in domestic corporations, owned by a nonresident decedent, are property within that territory and subject to the provisions of the act: *Estate of Hall*, 19 Haw. 531.

The statute of Colorado provides that the state may collect the inheritance on personal property located in that state although the decedent may have lived and died in another state where a similar tax existed and a similar provision obtains in New York and New Jersey: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555.

#### REFERENCES.

As to apportioning property of nonresident decedent within the state to payment of debts or legacies which are exempt or subject to a reduced rate, see note 18 L. R. A. (N. S.) 946-947.

Liability to pay inheritance tax in respect of stock in a domestic corporation belonging to the estate of a nonresident, 19 L. R. A. (N. S.) 887-890, 25 L. R. A. (N. S.) 384.

**(8) Reciprocal statutes.** It is provided by the statutes of some of the states that the inheritance tax is to be collected only in case the statutes of the state where a nonresident lives have the same provisions, thus recognizing a kind of reciprocity: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555.

**(9) Double taxation.** The payment of the inheritance tax of the states of New York and New Jersey is upon the same footing as the payment of the inheritance tax of the state of Colorado, and merely increases the tax the legatees have to pay for the privilege of succeeding to the property that passes under the law to them. So long as other states as well as the state of Colorado require an inheritance tax to be paid upon personal property located therein, while the decedent and beneficiary reside in a different state, and must pay the same kind of a tax there and the courts continue to



uphold such species of double taxation, then just so long will it be the duty of the courts to hold that the payment in one state is on the same basis as the payment in another, and if the tax be not deducted in the state where the principal administration is made before appraisement and computation, then the same kind of a tax paid in another state can not be deducted. The wisdom of such legislation is with the law making power and not with the courts: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 556.

#### 5. PRACTICE. COLLECTION. STATE CONTROLLER.

(1) **Practice.** Where a testator dies leaving his estate to a devisee who is subject to an inheritance tax and he also dies leaving in turn an estate, the residuary legatees of which are also subject to an inheritance tax, the first inheritance tax is to be deducted from the amount of the second estate upon which such second inheritance is to be computed: *Williams v. McDougald*, 23 Cal. App. 285, 137 Pac. 1067.

The usual provisions of inheritance tax statutes (that the executor or administrator must collect and pay the tax) is no proof or indication that the estate of the deceased is in any way liable for the tax, but are enacted to insure the payment of it: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555.

An inheritance is payable upon personal property in any state where the personal property is located at the time of the death of the decedent, if the statute of such state so provides, and a tax may be collected there, as well as in the state where the deceased died and where the heir resides: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555.

The amount of the tax as to any beneficiary is to be determined according to the value of the net succession. That is, value of such property as remains for him after satisfaction of such charges and burdens as may lawfully be satisfied in due course of administration; it is only such property that can be said to actually pass to beneficiary: *In re Hite's Estate*, 159 Cal. 392, 113 Pac. 1072.



In determining the valuation of the property of an estate which passed under a will to a residuary legatee, for the purpose of fixing the amount of the inheritance tax due under Inheritance Tax Act of 1905 (Stats. 1905, p. 341), the value of property which so passed to such legatee, but which by reason of its misappropriation by the executor was lost to the estate, is properly included: *Estate of Hite*, 159 Cal. 392, 113 Pac. 1072.

The question whether property is subject to the tax is to be determined on the conditions existing at the time of death, and the tax is to be assessed on the value of the property at that time. Subsequent appreciation or depreciation is immaterial: *Estate of Hite*, 159 Cal. 392, 113 Pac. 1072.

The right of the state to the tax accrues at the moment of death, and is measured as to any beneficiary by the value at that time of such property as then actually passes to him: *Estate of Hite*, 159 Cal. 392, 113 Pac. 1072.

#### REFERENCES.

Physical presence or absence of personal property, or evidence thereof, as affecting liability to tax, see note 46 L. R. A. (N. S.) 1167.

Basis and method of computing value of life estate or annuity for purposes of inheritance tax, see note 46 L. R. A. (N. S.) 714.

(2) **Payment of tax should appear in final account.** (See page 1771.)

(3) **Power and duty of state controller.** (See page 1771.)

(4) **What is residuary estate.** In determining the valuation of the property of an estate which passed under a will to a residuary legatee, for the purpose of fixing the amount of the inheritance tax due under the Inheritance Tax Act of 1905 (Stats. 1905, p. 341), the value of property which so passed to such legatee, but which by reason of its misappropriation by the executor was lost to the estate, is properly included: *Estate of Hite*, 159 Cal. 392, 113 Pac. 1072.

The residue of the estate of a person dying testate is that which remains after paying legacies, debts, and expenses of



administration. No deduction is allowed for foreign debts or expenses when property in foreign state is sufficient to pay those debts and expenses: *McDougald v. Low*, 164 Cal. 107, 127 Pac. 1027.

**(5) Appraisal.** A special appraisement of the estate of a decedent may be authorized to ascertain its value for the purposes of an inheritance tax when the circumstances of the case so require: *State v. District Court*, 41 Mont. 357, 109 Pac. 441.

The county court has jurisdiction to appoint a second appraiser in proceedings to ascertain an inheritance tax where the first appraisement was insufficient to enable it to make such ascertainment: *County Court v. Watson*, 51 Colo. 405, 118 Pac. 979.

Appraisal must be based on the value of the property at the time of the death of the decedent and subsequent appreciation or depreciation is immaterial: *In re Hite's Estate*, 159 Cal. 392, 113 Pac. 1072.

In making his appraisement of the market value of devised or inherited property an inheritance tax appraiser is to allow for and deduct from the value of such property all ripened liens, fixed charges, and proven debts outstanding against it: *Estate of Williams*, 23 Cal. App. 285, 137 Pac. 1067.

The tax can not accrue until the death of the decedent but does accrue and is payable immediately after the death, at which time it must be appraised for such purpose, and the accruing of the tax is not postponed until the estate is settled, although payment may not be exacted until it is determined what has passed under the will or the law: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555.

**(6) Bond for payment.** The statute of Colorado, as also those of other states, provides for the giving of a bond for payment of the inheritance tax in case it be not paid immediately after the death: *People v. Palmer's Estate*, — Colo. —, 139 Pac. 555.

## 6. APPEAL. (See page 1772.)

Probate Sup. 42.







# **PART XX.**

## **APPEAL.**

### **CHAPTER I.**

#### **APPEAL.**

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## 1. RIGHT OF APPEAL.

(1) **In general.** The right of appeal in probate matters from the probate to the district court in Idaho is of purely statutory regulation, and where the right is challenged, the authority for such appeal must be found in the statutes: *In re Coryell's Estate*, 16 Ida. 201, 101 Pac. 723.

There is no authority for an appeal in any probate matter not found in subdivision 3 of section 963 of the Code of Civil Procedure, and an attempted appeal from an order not therein found is abortive, and must be dismissed: *Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023. (See page 1776.)



- (2) **How limited.** (See page 1777.)
- (3) **Nonapplication of code provisions.** (See page 1777.)

## 2. NEW TRIAL AND APPEAL.

- (1) **In general.** (See page 1778.)
- (2) **Application of code provisions.** (See page 1778.)

(3) **Appeal from order denying new trial.** On an appeal from an order denying a motion for a new trial in a proceeding by executors for the settlement of the accounts and for the distribution of the decedent's estate, there being no appeal taken from the decree, the sufficiency of the findings to sustain the decree can not be reviewed: *Estate of Keating*, 162 Cal. 406, 122 Pac. 1079.

The fact of an appeal from a judgment having been dismissed on respondent's motion is no reason why an appeal from an order denying a motion for a new trial should not be entertained: *Murphy v. Nett*, 47 Mont. 38, 130 Pac. 452.

Where two ex parte applications for letters of administration are heard together and no issue is joined as to the competency of either of the parties to act, a motion for a new trial does not lie and there is no appeal from an order denying such a motion: *In re Antonioli's Estate*, 42 Mont. 219, 111 Pac. 1035. (See page 1779.)

## 3. WHO MAY APPEAL. EXECUTOR OR ADMINISTRATOR.

A person claiming to be entitled to the distribution of the estate of a deceased person as devisee, legatee, or heir at law, is entitled to appeal from the decree of distribution and to have a bill of exceptions thereon, embodying the pertinent evidences offered at the hearing, notwithstanding he may not have appeared in person in advocacy of or opposition to the matter pending for determination: *Estate of Benner*, 155 Cal. 153, 99 Pac. 715.



The right which an administrator may have to compensation on revocation of his letters on a will being admitted to probate is not such an interest as will entitle him to appeal from the order admitting the will: *Cairns v. Donahey*, 59 Wash. 130, 109 Pac. 335.

While as a general rule only parties to the record may prosecute an appeal, this is on the ground that in ordinary proceedings in personam it is only parties and their privies who are bound by the judgment, but probate proceedings being in rem, all interested parties are bound by the judgment or decree whether parties to it or not: *Barette v. Whitney*, 36 Utah 574, 106 Pac. 528.

An executor in his official capacity has not sufficient interest to entitle him to appeal from an order of partial distribution of the estate: *In re Macky's Estate*, 46 Colo. 79, 102 Pac. 1089. (See page 1779.)

#### 4. TIME FOR TAKING.

Under section 1715, Code of Civil Procedure, appeals in probate proceedings must be taken within sixty days after the order, decree, or judgment is entered. If not so taken the appeal will be dismissed: *Estate of Brewer*, 156 Cal. 89, 103 Pac. 486. (See page 1780.)

#### 5. APPEALABLE ORDERS.

(1) **Appealable orders. In general.** Under the provisions of Sec. 16, Art. 7, and Sec. 2 of the schedule of the constitution of Oklahoma, an appeal lies to the district court from the county court in probate matters in those cases in which an appeal was allowed under the statutes of Oklahoma Territory: *Barnett v. Blackstone Coal & Milling Co.*, 35 Okla. 724, 131 Pac. 541. (See page 1780.)

(2) **Appealable orders. Payment of claims.** (See page 1780.)

(3) **Appealable orders. Attorneys' fees.** (See page 1781.)



(4) **Appealable orders. Family allowance.** (See page 1781.)

(5) **Appealable orders. Settlement of accounts.** (See page 1781.)

(6) **Appealable orders. Distribution.** (See page 1782.)

(7) **Appealable orders. Sale. Distribution.** An order setting aside a prior order confirming the sale of land belonging to the estate of a deceased person is in legal effect an order against directing the sale or conveyance of real property within the meaning of subdivision 3 of Sec. 963 of the California Code of Civil Procedure, and is appealable: *Estate of West*, 162 Cal. 352, 122 Pac. 953.

An order of the district court which confirms an order of the county court in an ancillary administration refusing to grant a petition filed by the principal administrator under the direction of the principal court for the sale of real estate in North Dakota and the transmission of the proceeds thereof to such principal court for the payment of the debts there, is a final order, affecting a substantial right made in a special proceeding and is appealable as such under Sec. 7225, Rev. Codes 1905 (N. Dak.): *Dow v. Lillie*, 144 N. W. 1084.

An appeal may be taken from the probate to the district court upon the judgment of the former upon objections made to the confirmation of a sale: *In re Christensen's Estate*, 15 Ida. 692, 99 Pac. 829.

Upon a hearing in the district court of an appeal from a judgment of the probate court on objections to the confirmation of a sale, the case must be retried upon the same issues as were presented to the probate court, and witnesses may be called and testify the same as in the trial of any other cause: *In re Christensen's Estate*, 15 Ida. 692, 99 Pac. 829. (See page 1782.)

(8) **Appealable orders. Guardians.** (See page 1782.)



**(9) Appealable orders. Contests over probate of wills.** An order or judgment of a county court in dismissing a petition for the revocation of the probate of a will is an appealable order under subdiv. 8 of Sec. 5451, Comp. Laws 1909 of the state of Oklahoma: *Mackey v. Atoka*, 34 Okla. 512, 126 Pac. 767.

Under section 3041 of Cutting's Comp. Laws of Nevada an appeal will lie from an order refusing to revoke letters of administration: *In re Bailey's Estate*, 31 Nev. 377, 103 Pac. 233. (See page 1782.)

**(10) Appealable order. Appointment of administrator.** The decision of a probate court refusing to appoint an administrator as it effectually terminated the litigation of the question in that court was a final order or decision from which an appeal lies: *Miller's Estate v. Executrix of Miller's Estate*, 90 Kan. 819, 136 Pac. 256.

**(11) Appealable orders. Additional Inventory.** A decision of a probate court denying the application of an interested party for an order requiring the administrator to make an additional inventory of property, claimed to belong to the estate, but omitted from the inventory on file, is a final "decision" of a matter arising under the jurisdiction of that court, and an appeal may be taken therefrom: *Dobson v. Holmes*, 83 Kan. 476, 112 Pac. 121.

## 6. NONAPPEALABLE ORDERS.

**(1) Nonappealable orders. In general.** The fact, if it be true, that the court exceeded its jurisdiction in making the original order can not have the effect to make a nonappealable order appealable: *Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023.

The remedy of the parties dissatisfied with the jurisdiction of the court to make the original order would lie on a direct attack upon the court's action on that ground: *Estate of Seymour*, 15 Cal. 287, 114 Pac. 1023. (See page 1783.)



**(2) Nonappealable orders. Directions. Command. Contempt.** Where an order of the superior court fixed a place for the interment of the body of the decedent which had been deposited in a vault, and providing for a monument over the grave, an order refusing to vacate that order is not appealable, and an appeal therefrom must be dismissed: *Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023.

Even the original order directing the place of interment and providing for the expense of a monument is not appealable under the statute, any more than from an order refusing to vacate it: *Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023.

Where a claim against an estate is in the first instance allowed by the administrator and the probate judge, and thereafter upon objections filed by an heir such allowance is set aside, such claim is then pending against such estate, and an appeal will not lie from the order of the probate judge setting aside his former allowance of the claim: *In re Coryell's Estate*, 16 Ida. 201, 101 Pac. 724. (See page 1784.)

**(3) Nonappealable orders. Revocation of letters.** (See page 1784.)

**(4) Nonappealable orders. Accounts.** The statute of the state of Idaho authorizes an appeal to the district court from an order settling and allowing an account of an administrator, but where the probate judge settles and allows part of the account of an administrator and continues the remainder for future consideration and hearing, the judgment thus rendered does not settle such account as to the matters continued for future consideration; and an appeal will not lie from such order by those affected by or interested in the matters continued for future consideration: *In re Coryell's Estate*, 16 Ida. 201, 101 Pac. 724. (See page 1784.)

**(5) Nonappealable orders. Distribution.** (See page 1785.)



**(6) Nonappealable orders. Sales of property.** (See page 1785.)

**(7) Nonappealable orders. Homesteads.** (See page 1785.)

**(8) Nonappealable orders. Probate of wills.** (See page 1785.)

**(9) Nonappealable orders. For discovery of assets.** An order made under sections 7505, 7506 of the Revised Codes of Montana for discovery of assets belonging to the estate of a decedent is not a final order or judgment from which an appeal lies under subdivision 1 of section 7098: *In re Roberts' Estate*, 48 Mont. 40, 135 Pac. 910.

**(10) Nonappealable orders. Discontinuance of widow's allowance.** No appeal lies from order discontinuing widow's allowance under former order, such order not being contemplated by Code Civ. Proc., Sec. 963: *In re Overton's Estate*, 13 Cal. App. 117, 108 Pac. 1021.

**(11) Nonappealable orders. Granting motion to vacate allowance of claim.** Code Civ. Proc., Sec. 963, subd. 3, does not authorize appeal from order granting motion to vacate allowance of claim: *Kowalsky v. Santa Cruz County Superior Court*, 13 Cal. App. 218, 109 Pac. 158.

## 7. NOTICE OF APPEAL.

**(1) Sufficiency of.** After the entry of judgment a motion for new trial was made embracing all the grounds urged on the appeal from the judgment. The motion was denied, but it was the evident intent of appellant's counsel to appeal both from the judgment and from the order denying the motion. It was apparent, however, that the attempted appeal from the order was ineffectual. The notice of appeal recites that defendant "appeals from the judgment and that upon such appeal defendant will ask for a review of the order overruling the motion to set aside the verdict and to grant a new trial thereof." The undertaking on appeal in no way refers to or mentions the order denying the



new trial, but is merely an undertaking for the payment of the costs on the appeal from the judgment. Under the rule laid down in the case of *Sucker State Drill Co. v. Brock*, 120 N. W. 757, the attempted appeal from the order was held to be ineffectual, and the order denying the new trial is unappealed from, but the appeal from the judgment presents to the court the alleged errors of law occurring at the trial and preserved in the judgment roll: *Hedderich v. Hedderich*, 18 N. Dak. 491. (See page 1786.)

**(2) Service. Jurisdiction. Death of adverse party.** (See page 1786.)

**(3) Filing of notice and undertaking. Jurisdiction.** Where the statute provides that to effect an appeal appellant must serve and file a notice of appeal and also an undertaking for appeal within thirty days after the date of the order or decree and the undertaking filed was fatally defective it was held that such defect might be cured by the filing of an amended undertaking in proper form as the filing of a valid undertaking was not a condition precedent to the attacking of jurisdiction on appeal. Where such notice of appeal demands a trial de novo it is triable on evidence to be offered anew. The statute of North Dakota conferring upon the district court jurisdiction to try de novo probate matters appealed from the county court is not unconstitutional as violating section 111 of the constitution granting exclusive original jurisdiction to the probate court of such class of actions: *Davidson v. Unknown Heirs of Peterson*, 22 N. Dak. 484. (See page 1787.)

## 8. UNDERTAKING ON APPEAL.

**(1) In general.** Where an appeal bond in proper form and of approved security is tendered to and received by the probate judge within the time prescribed for taking appeals and is placed by him among the files in the case without endorsing it as filed, it is filed in contemplation of law: *Ald's Estate v. Appling*, 89 Kan. 340, 131 Pac. 569. (See page 1787.)



(2) **Application of statute. Official bond.** (See page 1788.)

(3) **Bond by representative. When not required.** (See page 1788.)

(4) **Bond by representative when required.** Where the law provides that an executor, administrator or guardian may appeal, without filing an undertaking, from a decree or order made in any proceeding in a case in which he has given an official bond and an order had been made revoking the probate of a will and the letters of administration issued to appellant it was held that at the time of taking the appeal appellant was not an administrator within the meaning of the statute and was not exonerated from filing an undertaking on appeal: *Rausier v. Hyndman*, 18 N. Dak. 197. (See page 1788.)

(5) **Poverty.** Under the provisions of the Civil Code of Arizona, 1901, pars. 1948-1951, upon filing an affidavit that he has made diligent efforts to give an appeal bond and is unable to do so by reason of his poverty, such affidavit shall operate a perfection of the appeal in respect to the matter of costs: *Bolen v. Superior Court*, 14 Ariz. 31, 123 Pac. 305.

## 9. JURISDICTION OF APPEAL. (See page 1789.)

### 10. PREMATURE APPEAL.

(1) **Dismissal of.** An appeal from a judgment dismissing an action by an heir to revoke the probate of a will on the ground of the infancy of the heir is not abandoned because the heir on attaining full age brings a subsequent action to revoke the probate, the subsequent action not being an election of remedies: *In re Dye's Estate*, 16 N. Mex. 297, 113 Pac. 840. (See page 1789.)

(2) **Entry of order. What constitutes.** (See page 1790.)



## 11. DISMISSAL OF APPEAL.

Where an appeal was taken from a decree of distribution and amendments to a proposed bill of exceptions were served more than two years prior to a motion to dismiss the appeal, and no other step was ever taken by the appellant, who failed to appear at the hearing of the motion to dismiss the appeal it will be dismissed for unwarrantable laches and delay: *Estate of Johnston*, 14 Cal. App. 376, 112 Pac. 191.

An opposition by heirs to the payment of a bequest of \$200,000 on the ground that it was upon a secret trust to evade the law of charities was addressed to the jurisdiction of the court to allow the same, on a motion to dismiss an appeal by the heirs from the judgment awarding the bequest, upon the ground that the order admitting the will to probate was final, and that the heirs are not parties aggrieved by the judgment, must be denied as the determination of such question involves the merits of the appeal. The merits of a case can not be examined on a motion to dismiss an appeal: *Estate of Sharp*, 10 Cal. App. 1, 100 Pac. 1071.

Appellant is responsible for the prompt assertion of the preference given to probate matters over all other civil causes on appeal to the district court and on his failure to proceed promptly the appeal will be dismissed but the circumstances of each case are to be considered by the district court so as to avoid a peremptory or arbitrary dismissal: *In re Shapter's Estate*, 44 Colo. 547, 99 Pac. 38.

The probate court directed the jury to find against the will. Proponents appealed. The district court reversed the probate court. Contestants appealed to the supreme court, which affirmed the district court and remanded the case to that court for hearing de novo. Nothing was then done for seventeen months. Application was then made to the district court to dismiss the matter for want of prosecution. The application was granted. Appeal was taken to the supreme court and the judgment of dismissal was affirmed: *In re Shafter's Estate*, 44 Colo. 547, 99 Pac. 39. (See page 1790.)



## 12. STATEMENT. BILL OF EXCEPTIONS. JUDGMENT ROLL.

On an appeal from an order denying a motion for new trial of a contest of a will after probate, it is not essential that the papers constituting the judgment roll or the order denying the motion should be authenticated by being embodied in a bill of exceptions. The judgment roll in such case should include at least the petition for revocation of the probate, the answer thereto, the verdict of the jury and the judgment, and it is sufficient under section 953 of the California Code of Civil Procedure if such papers are authenticated by the clerk's certificate: *Estate of Kilborn*, 162 Cal 4, 120 Pac. 762.

On an appeal from an order admitting a will to probate, a recital in the order of the giving of notice of the hearing of the petition for probate is sufficient to establish the truth of the fact recited, unless the record shows affirmatively that the recital is untrue: *Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233. (See page 1791.)

## 13. CONSIDERATION ON APPEAL.

(1) **In general.** Where after a verdict for a plaintiff suing as administrator, a motion in arrest of judgment was sustained and judgment entered dismissing the action on the ground that plaintiff's appointment as administrator was void, which judgment was reversed by the appellate court and a judgment on the verdict directed, the only question concluded by such decision of the appellate court was that of the validity of plaintiff's appointment, and the defendant may maintain proceedings in error after the entry of the final judgment to review questions which arose on the trial and which could not have been considered by the appellate court on the prior hearing: *Alaska-Treadwell Gold Mining Co. v. Cheny*, 162 Fed. 593, 89 C. C. A. 357. (See page 1791.)

(2) **Review of discretion.** In reviewing on appeal, an order granting a nonsuit on a contest of a will, in determining whether the evidence presented was sufficient to take



the case from the jury, the entire evidence presented is to be viewed from a point most favorable to the contestant. Disregard is had of any contradictory evidence. All facts supporting the case of contestant must be taken as true and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor: *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532. (See page 1792.)

(3) **Presumptions.** Where an appeal is taken from a decree of partial distribution under the will of a deceased person on the judgment roll, without a bill of exceptions, all presumptions upon appeal are in favor of the regularity of the judgment and decree of the trial court, and where the decree recites that no one appeared or opposed the application, and that the petitioner is the sole devisee under the will of the deceased, and that deceased left no legal heirs, the judgment must be affirmed: *Estate of Kearney*, 13 Cal. App. 92, 109 Pac. 37. (See page 1793.)

#### 14. LAW OF THE CASE. (See page 1793.)

#### 15. CERTIORARI.

Order requiring administrator to give additional security is independent of other proceedings and reviewable only by certiorari: *In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530. (See page 1793.)

#### 16. WRIT OF ERROR. (See page 1793.)

#### 17. TO CIRCUIT OR DISTRICT COURT.

(1) **Trial de novo.** Where the county court sitting in probate had allowed part of a claim against the estate of a decedent on an appeal to the district court, the trial there should be in all respects a trial de novo: *McAfee v. McAfee's Estate*, — Colo. —, 136 Pac. 1052.

If an appeal is taken upon questions both of law and fact from the county court to the district court in a probate mat-



ter, under section 4836, Revised Codes of Idaho, the trial in the district court is de novo: *Kent v. Dalrymple*, 23 Ida. 694, 132 Pac. 303. (See page 1794.)

(2) **Findings.** (See page 1795.)

(3) **Correction and execution of judgment.** (See page 1795.)

## 18. ALTERNATIVE METHOD.

When chapter 1, title XIII, part II of the Code of Civil Procedure relating to appeals in general was enlarged by the addition of the new sections furnishing an alternative method of taking appeals, these sections, both by the generality of their language and by the terms of section 1714 of that code, were carried over and imparted into probate proceedings, but, like the provisions which they supplemented, only in so far as they were consistent with the rules laid down in the title governing probate proceedings. The appellant may follow the method laid down in the new sections, and may perfect an appeal by filing a notice, without serving it or filing an undertaking. But in the matter of time for taking an appeal, section 1715 still remains in force: *Estate of Brewer*, 156 Cal. 89, 103 Pac. 486.

## 19. EFFECT OF APPEAL.

Upon an appeal which stays proceedings the subject matter involved is removed from the jurisdiction of the lower court until the appeal has been determined, so that a county court has no jurisdiction, pending appeal to the district court from an order transferring a guardianship proceeding to the county court of another county, to transmit certified copies of its proceedings to such other court and such court on receiving them is without jurisdiction to act: *Burnett v. Jackson*, 27 Okla. 275, 111 Pac. 194.



# **PART XXI.**

## **VARIOUS PROVISIONS OF THE CODES, AND MISCELLANEOUS FORMS.**

### **CHAPTER I.**

#### **TESTIMONY OF PARTIES, OR PERSONS INTERESTED, FOR OR AGAINST REPRESENTATIVES, SURVIVORS OR SUC- CESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT.**

- 1. Application of statute.**
  - (1) In general. California statute.
  - (2) Same. Statutes of other states.
  - (3) Equal footing and equal balance of disadvantages.
  - (4) Meaning of terms.
- 2. Particular matters, to which statute does not apply.**
  - (1) In general.
  - (2) Claim in favor of estate.
  - (3) Controversies as to relative rights of heirs or devisees.
  - (4) Actions to quiet title.
  - (5) To establish a resulting trust.
- 3. Who are competent.**
  - (1) In general.
  - (2) Parties not interested.
  - (3) Party may testify to what in general.
  - (4) Party may testify to what in particular.
  - (5) Employees, clerks, agents, etc.
  - (6) Officers and stockholders of corporations.
  - (7) Widow of deceased.
  - (8) Competency in other particular instances.
- 4. Who are incompetent.**
  - (1) In general.
  - (2) Parties can not testify to what in general.
  - (3) Parties can not testify to what in particular.
  - (4) Partnership affairs in general.
  - (5) Action by or against surviving partner.
  - (6) Action on note indorsed to partnership.
  - (7) Physician's services to deceased.
  - (8) Fraud.



- (9) Gifts.
- (10) Promissory notes.
- (11) Establishment or enforcement of trusts.
- (12) Contest of will, or of its probate.
- (13) Incompetency in other particular instances.

## 1. APPLICATION OF STATUTE.

- (1) In general. California statute. (See page 1836.)
- (2) In general. Statutes of other states. (See page 1837.)
- (3) Equal footing and equal balances of disadvantages. (See page 1838.)
- (4) Meaning of terms. (See page 1839.)

## 2. PARTICULAR MATTERS, TO WHICH STATUTE DOES NOT APPLY.

- (1) In general. (See page 1840.)
- (2) Claim in favor of estate. (See page 1841.)
- (3) Controversies as to relative rights of heirs or devisees. A plaintiff who is suing to recover real estate claimed by her by virtue of being the wife of the decedent, where the defendants are the grandchildren and great grandchildren of decedent and who acquire their interest in the real estate through the daughter of the decedent is not prohibited by section 320 of the Code of Civil Procedure from testifying to communications and transactions had personally with the decedent, as the parties adverse to her did not acquire their title to the cause of action immediately from the decedent: *Williams v. Campbell*, 84 Kan. 46, 113 Pac. 800.
- (4) Actions to quiet title. (See page 1842.)
- (5) To establish a resulting trust. The statute forbidding a party to testify in his own behalf as to any transaction had personally with a decedent, etc., has no application to the admissibility in evidence in an action to establish a resulting trust, of a letter written by defendant's intestate



to plaintiff, wherein he stated that he held the real estate in question as her agent: *Garten v. Trobridge*, 80 Kan. 720, 104 Pac. 1067.

### 3. WHO ARE COMPETENT.

(1) **In general.** No one is disqualified as a witness by reason of his interest in the result of a litigation and the term "party" as used in section 320 of the Code of Civil Procedure of Kansas, which prohibits a party from testifying concerning personal transactions and communications with a person since deceased, does not mean or include one not technically a party to the action, however much he may be interested in the result of the action: *Hess v. Hartwig*, 83 Kan. 592, 112 Pac. 99. (See page 1843.)

(2) **Parties not interested.** (See page 1844.)

(3) **Party may testify to what in general.** (See page 1845.)

(4) **Party may testify to what in particular.** In an action by an administrator to recover money loaned to the defendant by the decedent, there was testimony by the defendant to the effect that money for the payment of the debt was enclosed in an envelope and taken to the postoffice, and that certain steps were there taken to have the postmaster register the letter and send it to the decedent in a distant state and also that in due time he received a writing acknowledging the receipt of the money, and this was identified and introduced in evidence. Held that the admission of the testimony did not violate the limitation prescribed in section 320 of the Code of Civil Procedure which prohibits a party in a case like this from testifying to a communication or transaction had personally with the decedent: *Bryan v. Palmer*, 83 Kan. 298, 111 Pac. 443.

As a wife may give testimony for the purpose of establishing the claim of her husband against an estate there is no reason why she may not testify in his behalf for the purpose of establishing his claim as a legatee or devisee under a will:



In re Hatfield's Will, 21 Colo. App. 443, 122 Pac. 64. (See page 1846.)

(5) **Employees, clerks, agents, etc.** (See page 1848.)

(6) **Officers and stockholders of corporations.** (See page 1849.)

(7) **Widow of deceased.** A widow is not disqualified from testifying after she has filed a disclaimer as she is then no longer a party to the action and a defendant can not disqualify her by an averment in a cross complaint that she claimed an interest in the property: *Denny v. Schwabacher*, 54 Wash. 689, 104 Pac. 139. (See page 1850.)

(8) **Competency in particular instances.** In a suit attacking a will, testimony of a devisee that he had no communication with testatrix is not rendered inadmissible by a statute which forbids testimony by a devisee in his own behalf in regard to a communication had with testatrix: *Gaston v. Gaston*, 83 Kan. 215, 109 Pac. 777. (See page 1850.)

#### 4. WHO ARE INCOMPETENT.

(1) **In general.** A woman who commences a proceeding to establish her marriage with a decedent is incompetent to testify as to such marriage, or to any other transaction with the deceased under the statute of Washington: *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 825. (See page 1852.)

(3) **Parties can not testify to what in particular.** Under the rule forbidding a party in an action against an administrator to testify in his own behalf in respect to any transaction had personally with the decedent, such party may not testify to his own conduct, if in so doing he necessarily attributes to the decedent some act or attitude with respect thereto, he may not testify that he rendered services of such a character that if they were performed at all it must have been with the acquiescence of the decedent: *Clifton v. Meuser*, 79 Kan. 655, 100 Pac. 644. (See page 1852.)

(4) **Partnership affairs in general.** (See page 1855.)



(5) **Action against or by surviving partner.** (See page 1856.)

(6) **Action on note endorsed to partnership.** (See page 1857.)

(7) **Physician's services to deceased.** (See page 1857.)

(8) **Fraud.** A stockholder in a joint stock corporation is a "person directly interested" in an action by the corporation against an administrator to recover money of the corporation misappropriated by the deceased and as such is incompetent to testify in the action: *Brown v. First Nat. Bank*, 49 Colo. 393, 113 Pac. 484.

(9) **Gifts.** (See page 1858.)

(10) **Promissory notes.** (See page 1858.)

(11) **Establishment or enforcement of trusts.** Land was conveyed to a wife who subsequently died leaving a will whereby she devised the land to her husband. The wife's mother then claimed the land as having been bought with her money and was allowed to put in evidence entries in her books of account showing payments of money by her to her daughter and she then sought to explain those entries by stating that the payments were made to the daughter on account of the purchase price of the land but was not allowed to do so on the ground that it would infringe the rule against testifying as to transactions had with a decedent: *Smith v. Scott*, 51 Wash. 330, 98 Pac. 763. (See page 1859.)

(12) **Contest of will, or of its probate.** (See page 1860.)

(13) **Incompetency in other particular instances.** A corporate stockholder in a suit by him for the benefit of the company on a bond against the administrator of the principal obligor is disqualified under Mills Ann. Stats., Sec. 4816 of Colorado, and such disqualification is not removed by the fact that one of the sureties on the bond is still living: *Cree v. Becker*, 49 Colo. 268, 112 Pac. 785. (See page 1861.)







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